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# REPORT OF CASES

DECIDED IN THE

## COURT OF QUEEN'S BENCH.

BY

CHRISTOPHER ROBINSON, ESQ.,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

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VOL. XX.

CONTAINING THE CASES DETERMINED  
FROM TRINITY TERM 24 VICTORIA, TO TRINITY TERM 25 VICTORIA :  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
AND DIGEST OF THE PRINCIPAL MATTERS.

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TORONTO:

HENRY ROWSELL.

1861.

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ORDERED IN THE

## COURT OF QUEEN'S BENCH

CHRISTOPHER ROBINSON, ESQ.

BARRETT AT-LAW AND REPORTER TO THE COURT

Entered according to Act of Provincial Legislature, in the year of our Lord one thousand eight hundred and sixty-one, by HENRY ROWSELL, in the Office of the Registrar of the Province of Canada.

VOL. XX.

CONTAINING THE CASES DETERMINED  
FROM JANUARY TERM & VICTORIA TO TRINITY TERM 1861  
WITH A TABLE OF THE NAMES OF CASES ADDED  
AND INDEX OF THE PRINCIPAL MATTERS

TORONTO:

HENRY ROWSELL

1861



JUDGES  
OF  
THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS:

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD McLEAN, J.

“ ROBERT EASTON BURNS, J.

---

*Attorney-General:*

HON. JOHN A. MACDONALD.

*Solicitor-General:*

HON. JOSEPH C. MORRISON.





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REPORT OF CASES  
IN THE  
COURT OF QUEEN'S BENCH.

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TRINITY TERM, 24 VICTORIA, 1860, (*Continued.*)

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*Present:*

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD McLEAN, J.

“ ROBERT EASTON BURNS, J.

---

STREET ET AL., EXECUTORS OF VYSE, v. BECKWITH.

*Promissory note—Verbal agreement—Devise.*

To an action by the executors of V., on a promissory note payable to him or bearer, defendant set up as a defence, that by his last will V. devised to each of his children, of whom defendant's wife was one, £250, to be paid by his executors as soon as possible; and declared that in case he should advance money during his life-time to any of his children on account of such legacies, a receipt therefor should be sufficient as payment of so much on account of the sum bequeathed: that on the 4th of April, 1856, the testator advanced to defendant £100 on account of the sum devised to his wife, and defendant then delivered to him the note sued on as evidence of such advance, it being agreed between them that defendant should not be called upon to pay said note, but that it should be held as a receipt for so much of the legacy; and defendant alleged that he had always been willing, and had offered to sign a receipt for that sum.

The will when produced was in the terms alleged, but a codicil was added, made after the note, directing that none of the legacies should be paid until the completion of payments on certain lands due by his son.

*Held*, that the plaintiff must recover, for verbal evidence could not be received of such an agreement as alleged, and the statement of the will in defendant's plea was incorrect.

ACTION on a promissory note, made by the defendant payable to James Vyse or bearer, for £100, dated the 24th of April, 1856, and payable twelve months after date, with interest.

The defendant pleaded a special plea, stating that James Vyse in his life-time, on the 6th of July, 1854, made his will, and therein recited that he had bargained with his son Richard, one of the plaintiffs, for the sale of his farm, and that he had executed a bond in his favour, conditioned for



the conveyance of the farm to him, his heirs and assigns, on payment of certain moneys: that in the sale of the farm it was understood and arranged that £250, part of the purchase money, should be retained by him, Richard, as his share or portion of the testator's estate; and he then ordered and directed that all his estate and effects remaining at his decease should be equally divided among his children thereafter named, or their representatives, or if not amicably divided that they should be sold by his executors, and the proceeds should be equally divided; and that of the money left by him, the said James Vyse, at his decease, or obtained for securities for money, the testator directed that the sum of £250 should be paid to each of his children thereafter named—that is, to Richard Vyse, William Vyse, Marian Robins, wife of James Robins, and Emma Beckwith, wife of the defendant—and payable to each of them, in the order in which they were named, as the moneys in the hands of the executors should enable them to pay the same; and that the said will contained a proviso that in case the said James Vyse should see fit to advance to any of his said children any moneys on account of moneys by the said will bequeathed, a receipt for such moneys should be good and sufficient in payment or part payment of such legacies; and the defendant averred that on the 4th of April, 1856, before the death of the said testator, he, the testator, not having in any manner revoked or altered his will, advanced to the defendant, husband of the said Emma Beckwith, for and on account of the legacy by the will bequeathed, the sum of £100, and the defendant then made and delivered to the said James Vyse the promissory note in the declaration mentioned, as evidence of the said loan or advance; and it was then and afterwards agreed to between the defendant and the testator, that the defendant should not be called upon to pay the amount of the said promissory note, but that the same should be held by the testator, and after his death by his executors, as an acknowledgment or receipt that the defendant had received so much of the legacy bequeathed to his wife, and as a set-off against so much of such legacy as in the will provided. And the defendant further said, that he had always

been ready and willing to sign and execute a good and sufficient receipt for the said £100, for and on account of the legacy, and since the commencement of the suit, to wit, on the 2nd of April, 1859, tendered and offered to do so.

The plaintiffs took issue upon the plea.

At the trial, at Milton, before *Burns*, J., the promissory note was produced, and it appeared that the defendant had, on the 23rd of May, 1857, paid the testator a year's interest upon it. The testator died about the 1st of December, 1858. Probate of the testator's will was produced, shewing that his will was made on the 6th of July, 1854, and was in the terms set forth in the plea. A codicil was attached to the will, made on the 15th of January, 1857, being after the note was made by the defendant, and before payment of the year's interest upon the note. The codicil, as to the payment of the legacies, was in these words, after confirming his will—"I therefore will that no part or whole of the portions named in the said will, be paid unto each or any of them, my children, before the expiration of five years from this date to the completion of payments on the land due by my son Richard Vyse; then each as named, or their representatives, shall receive from my executors the sum of £250, and the balance, after expenses of executors in administering, shall be equally divided between all my children or their representatives."

The learned judge was then asked upon these facts whether he would rule that the defendant could offer verbal testimony to prove such an agreement as stated in the plea to control the legal effect of the note, and to contradict the terms of the codicil of the will; and he decided that such testimony could not be given. A verdict was therefore entered for the plaintiffs, for the amount of the note and interest, and leave was reserved to the defendant to move the court to enter verdict for him, if the action could not be maintained.

*Hector Cameron* obtained a rule *nisi* to enter a verdict for the defendant, on the ground that under the will of the testator, and the facts of the case as admitted under the

plea, this action could not be maintained. He cited Wms. on Exrs. 1177, 1178; Davis v. Elmes, 1 Beav. 131.

*English* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We think the learned judge was right in his ruling that the evidence could not be received. The plea should have been demurred to, but from the manner in which the defendant referred to the judge at the trial for his legal opinion upon the defence before he attempted to sustain it, we suppose the parties must have desired to waive the necessity of moving after judgment against the sufficiency of the plea.

It clearly could not have been supported by evidence, for the production of the will and codicil shewed that the will had been altered in regard to the time for paying the legacies, and that the statement in the plea of the testator's *last will* was incorrect.

Then here we have also an alleged verbal agreement made either at or before the making of the note, or if afterwards without consideration for such subsequent agreement, to the effect that the defendant need not pay the money, but that the note should be looked upon only as a receipt of so much money in advance of a legacy that might or might not become payable to the defendant's wife.

Evidence could not legally be received to support such a defence.

Rule discharged.

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### KEYES V. O'BRIEN.

*Covenant for title—Right of action.*

An assignee of part of the land conveyed by a deed containing a covenant for seisin in fee may sue upon the covenant and recover damages in proportion to his interest.

This was an action on the covenants for seisin in fee-simple free from incumbrances, contained in a deed of conveyance of certain land from the defendant to the plaintiff, the breach assigned being a claim for dower which had been enforced against the plaintiff.



At the trial, at Belleville, before *Robinson*, C. J., it appeared that the deed sued upon conveyed to the plaintiff a quarter of an acre of land, for a consideration of £20. The plaintiff had conveyed the same land to one Thresher and received a re-conveyance of a small portion, about twenty feet in front by five rods in depth, which was all that he held at the time of bringing this action.

It was objected that the plaintiff could not recover, because he was not seised at the time of action brought of the whole of the property conveyed to him by the defendant, and that the covenant was indivisible.

Leave was reserved to move upon that ground, and the jury found a verdict for the plaintiff, and £19 8s. 10d. damages, being £12 15s. 6d., the costs taxed in the proceedings to recover dower, and £6 13s. 4d., which they explained they gave as being one-third of the £20 which the plaintiff had paid to defendant for the land conveyed to him by defendant's deed.

*O'Hare* obtained a rule *nisi* to enter a verdict for defendant, or a nonsuit pursuant to leave reserved.

*M. R. Vankoughnet* shewed cause, and cited *Rawle* on Covenants for Title, 362-3, 366; *Twynam v. Pickard*, 2 B. & Al. 105; *Merceron v. Dowson*, 5 B. & Cr. 481; *Curtis v. Spitty*, 1 Bing. N. C. 756; *Stevenson v. Lambard*, 2 East 575; *Sug. V. & P. II.* 507, 508.

*Richards*, Q. C., supported the rule, citing *Preston* on Abstracts, 57, 58.

ROBINSON, C. J., delivered the judgment of the court.

This case has been argued upon the single question on which the plaintiff's legal right to recover damages to any amount whatever was resisted at the trial: that is to say, whether the plaintiff, who is assignee of a portion only of the real estate which was conveyed by the defendant to the plaintiff by the deed containing the covenant for title now sued upon, can maintain an action as assignee upon that covenant. It is contended that he cannot, because he does not own the whole estate to which the covenant extends, but only a small portion of it.

It appears to us that in reason the remedy upon a covenant which runs with the land, which is this case, should not be confined to the assignee of the whole reversion, but that it should be competent to the assignee of part of the land to sue upon the covenant for title, and to recover damages in proportion to his interest. Upon an examination of the authorities to which we were referred, and of such others as we have been able to meet with, we think the weight of authority also is in favour of such an action by an assignee of part of the land to which the covenant extends, and of course of actions by all the assignees, where the estate has been conveyed by the covenantor to several parties.

The most express opinions upon the point are those cited to us from Mr. Preston's work on Abstracts of Title, vol. III., 57-8, and from Sugden on Vendors, 508. Unfortunately they are opposed to each other, but as Mr. Sugden has deliberately considered the opinion expressed by Preston, and has disapproved of it, though not in very positive terms, we must admit, we think, that the weight of his authority is entitled to prevail.

The little that can be found bearing upon the question in the general form is chiefly, if not altogether, in cases upon leases, in which cases the statute 32 H. VIII., ch. 34, has been relied upon for giving assignees a right to sue; but it seems to us that such cases on the statute apply in principle to the present, as does also in a measure the language of the judges who have decided them.

It might have been expected that many cases would be found in which actions had been brought on covenants for title by an assignee of part of the estate, but, however it is to be accounted for, we do not find such cases. In American courts the ability of such assignees of part to sue has been recognised in many cases, though they seem to have been unable to cite English decisions supporting that view.

The plaintiff here has a verdict which we should not be warranted by authority, we think, in setting aside, so far as this general point of law is concerned, and the verdict is not moved against on other grounds.

Rule discharged.

## BECHTEL V. STREET.

*Action for obstructing river—Prescriptive right—Pleading.*

*Declaration*, for maintaining a dam across the Grand river, below the plaintiff's land, and thereby penning back the water thereon.

*Plea*, that the dam was erected on a close occupied by defendant, for the purpose of supplying certain mills on said close with water, and had in it certain sluices or gates to let off or keep back the water, as might be required for the use of said mills: that the defendant and other occupiers of said mills had enjoyed as of right, and without interruption, for twenty years before this suit, the right of keeping up said dam and of closing the gates therein as often as occasion might require for the purpose aforesaid, and the right of damming back the water on such occasions, and of causing the same to overflow a portion of the plaintiff's land, doing no unnecessary damage in the use of such right; and that the injuries complained of were thus caused.

*Held*, on demurrer, plea good. *Robinson, C. J.*, doubting whether it should not have been averred more plainly that the injury to the plaintiff during the twenty years had been the same.

DECLARATION, that the plaintiff was possessed of a certain close, &c., upon the Grand river, and of right ought to have enjoyed the benefit of the said river or water-course running and flowing past the said close, without being penned back upon and overflowing the said close, and free from any obstruction by any person whatsoever; yet the defendant, wrongfully intending to injure the plaintiff, wrongfully maintained and continued erected a certain dam or obstruction across the said river, and lower down the stream thereof than the plaintiff's said close, and thereby wrongfully and injuriously forced and penned back the waters of the said river out of their usual flow, whereby the said waters ran and overflowed the said close and lands of the plaintiff, causing thereby the destruction of the plaintiff's crops, &c., &c.

*Plea*, that the said dam was and still is a dam erected across the said river, on a certain close occupied by defendant, for the purpose of supplying with water for various manufacturing purposes certain mills also erected on the said last mentioned close, of which said mills also the said defendant at the time of the commencement of this suit was and still is the occupant, on which said dam from the time of the erection thereof there were and still are certain sluices and gates, by the shutting and opening of which the waters of the said river, from the time of the erection of the said dam, have been and still are from time to time penned



and dammed back, and let off, respectively, as occasion may require, for the necessary use and enjoyment of the said mills; and the defendant says that the said defendant, and all the occupiers for the time being of the said mills and premises, and of the said dam, have and each of them hath had and enjoyed as of right, and without interruption, for the full period of twenty years next before the commencement of this suit, the right, easement, and benefit, for himself and themselves, so for the time being such occupiers as aforesaid, of keeping and continuing erected the said dam or obstruction, with the said sluices and gates thereon, upon the said close and premises of the said defendant, and of closing, shutting, and keeping closed and shut the said sluice and gates on the said dam, as often as occasion might require, for the purposes aforesaid, through which said sluices and gates, at the times in the declaration mentioned, the waters of the said river might, and otherwise would have flowed freely, and without obstruction; and the right, easement, and benefit of obstructing, damming, and penning back, by the means, and in the manner, and upon the occasions aforesaid, the waters of the said river, and of causing the same thereby to overflow a portion of the said close and lands of the plaintiff, in the declaration mentioned, doing no unnecessary damage to the plaintiff's said close in the use and enjoyment of such right and easement; and the defendant says that the alleged injuries to the said close of the plaintiff in the declaration mentioned, were occasioned by such, the penning and damming back the waters of the said river, in the manner and by the means aforesaid, and upon the occasion of the necessary use and enjoyment by the said defendant of the said mills, the defendant doing thereby to the plaintiff's said close and premises no unnecessary damage upon the occasion aforesaid.

*Demurrer*, that the plea and the facts alleged therein are no answer to the declaration: that a prescription for twenty years is attempted to be set up, but it is not shewn that there had been an actual user for the period of twenty years: that instead of a continued user, the defendant asserts a right existing during that period, but only asserts the actual en-

joyment and use of the said privilege at occasional times when it was required, but not that it was continually used for the said period of twenty years; and that the said right is not claimed with sufficient certainty.

*McMichael* for the demurrer, cited *Hunt v. Hespeler*, 6 C. P. 269; *Smith v. Wallbridge*, ib. 324; *McKechnie et al., v. McKeyes*, 9 U. C. R. 563.

*Gwynne*, Q. C., contra, cited *Chy. on Plg. iii.*, 271, 273; *Haley v. Ennis, et al.*, 10 U. C. R. 404.

ROBINSON, C. J., delivered the judgment of the court.

This plea appeared to me at first not to be materially different from the pleas which were held bad in the two cases cited, of *McKechnie v. McKeyes*, (9 U. C. R. 563,) and *Hunt v. Hespeler*, (6 C. P. 269,) but I see on examination that there is an essential difference. The defendant referred us to a precedent in *Chitty on Pleading*, Vol. iii., page 271, but that is so far different from this plea that it mentions a certain height, to which the defendant had for twenty years enjoyed the right of backing the water; that is, 3 ft. 10 inches above the bed of the stream. In this there is no such limit shewn of the enjoyment or right. The defendant seems to rest wholly on the alleged identity of the dam which has stood for more than twenty years, and to assume that it must throughout that time always have raised the water to the same height, while the sluices or gates were shut.

The important question of fact is not how high the dam was for twenty years, but how high the water has been backed up on the plaintiff's land during that time, and I confess I should have expected in any approved precedent of a plea of prescription to find that point more clearly brought out than it is in the precedent in *Mr. Chitty's* excellent work.

But we are not disposed to treat that precedent as one that it is not safe to follow; and taking it to be sufficient, then the question is whether the plea now before us is not in substance and effect the same, though it does not specify the height of the dam as the precedent in *Chitty* does. It may, we think, be held that it is substantially the same in its statement, for what it states is that the defendant has

*enjoyed*, which has been held equivalent to saying that he has *exercised*, for twenty years the right and privilege of keeping up the same dam as that which forms the obstruction, and occasions the injury complained of. If that be so, it is of no consequence what the height of that dam was and is; the fact of identity is the material thing.

It is true that the same dam may have backed water to a less extent twenty years ago than it does now, for it may have been higher of late years, and from other causes it may not have obstructed the water through the twenty years to the same extent as at present; but it would appear from the course of decisions, and the precedents of pleadings in such cases, that that should be replied by the plaintiffs, if the fact be so, and that without this we may intend that the same dam which has existed for twenty years backs the water to the same extent.

I confess I am not altogether satisfied with the soundness and good sense of this view of the pleadings, for it does seem to me that the plea should plainly assert that through the twenty years the injury to the plaintiff has been the same as now. I will not however differ from my brothers who consider the plea sufficient.

I fully agree that it is sufficient, if the defendant has, as the plea states, kept the water back, not at all times—that is, through the whole of each day, or week, or month—but whenever it was necessary for working his mills, letting the water down when it was not requisite for his purpose to keep it up, provided the privilege was so exercised as a matter of right, and without denial or interruption by the plaintiff.

Judgment for defendant on demurrer.

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### WILSON V. MUNRO, SHERIFF.

*Action for escape—Limitation—Pleading.*

To a declaration against a sheriff for an escape from arrest under a *capias*, defendant pleaded, 1. That the action did not accrue within two years.

2. That the plaintiff did not declare in the cause in which the arrest was made within one year, and did not prosecute said suit.

*Held*, on demurrer, both pleas bad.

This was an action against the defendant, as sheriff of the



county of Elgin, for the escape of one William Storey, who had been arrested under a writ of *capias* at the plaintiff's suit. The declaration alleged that said Storey had not caused special bail to be put in for him, or otherwise observed the writ.

Defendant pleaded, among other pleas, 4, that the alleged cause of action did not accrue within two years before this suit.

5. That the said plaintiff did not file or serve any declaration, or copy of declaration, in the cause mentioned, within one year from the time of the said supposed arrest of the said William Storey, and did not further prosecute the said suit against the said William Storey.

The plaintiff demurred to both pleas, assigning for ground of demurrer to the fifth plea, that as the said William Storey neither remained in the custody of the defendant for want of sureties, nor caused special bail to be put in for him to the said action, the plaintiff could not nor was he required to declare against the said William Storey, or further prosecute the said action.

*Crombie*, for the demurrer, cited Consol. Stats. U. C., ch. 78, sec. 7.

*Richards*, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that both the pleas demurred to are bad. The statute (Consol. Stats. U. C. ch. 78, sec. 7,) clearly allows six years for bringing such an action as the present; and as to the fifth plea, it is sufficient for the sheriff to have a writ that will protect him in making the arrest. We can not enter into the question whether the prisoner could not claim to be superseded if he were in custody. That is a matter between the plaintiff and defendant only. Of course the plaintiff would not declare if the party was not in custody or could not give bail.

Judgment for plaintiff on demurrer.

## MINAKER V. HAWKINS.

## MINAKER V. ASHE.

*Dower—Evidence of seisin—Estoppel.*

In an action of dower by the widow of M., it appeared that a patent for the land issued to one K., and a witness was called, who proved that he was one of the subscribing witnesses to K.'s will, but the will was not produced, and no evidence of its contents given. It was proved, however, that B., the person from whom defendants purchased, derived title through P., who had held a bond for a deed from the patentee, and that P. before he sold to B. took a quit claim from M. *of all his interest in the land, executed by M. only, in which it was stated that the land "was devised by will to the said M. by K., the original grantee of the Crown."* Held, that no estoppel arose upon this deed, and that there was no proof of seisin in M.

These were actions brought to recover dower in lot 13, in the 5th concession of Hamilton.

There was no averment that the husband died seised, and no damages claimed.

In both cases the tenant pleaded that her husband was not so seised at any time that he could endow, &c.

At the trial, at Cobourg, before *Robinson, C. J.*, the demandant produced a patent from the Crown to one Michael Kesler of this lot, dated the 17th of May, 1802, granting the whole lot to him in fee. She then called as a witness a nephew of Ludowick Minaker, who swore that Kesler, the patentee, was a discharged soldier who died at a great age, 33 or 34 years ago, unmarried, as the witness believed: that he had lived with Ludowick Minaker for twenty years or more; that Kesler made a will, which the witness saw, and to which he was a subscribing witness, with two others, and that the will was drawn by one Dingman, a magistrate. He swore that he did not know where the will could be found, nor who were the executors, and he gave no evidence of its contents. He stated that he went to Louis Minaker, son of Ludowick Minaker, which latter died about two years ago, and searched among his papers for the will, but could not find it. Louis Minaker swore also that he had found no will among his father's papers. Evidence was given of a search in the County Register, and in the Surrogate Offices at Kingston, Belleville, and Picton, but no will could be found. There was no proof of a search in the Office of the

Court of Probate. It was sworn that Kesler had no chattel property. He died in Marysburg, Prince Edward County.

There was no proof that any one had seen a will of Kesler *after his death*, and no evidence whatever of the contents of his will.

The defendants, it was proved, had purchased each of them a portion of this lot from the late Hon. Z. Burnham, who held a conveyance in fee from one Leonard Perrin. It was proved that in 1799 Kesler gave a bond for a deed of this land to one Isaac Secord, who assigned his interest to one Eastman, and Eastman assigned it to Perrin. In order to confirm his title derived through this bond from Kesler, the patentee, to Secord, Perrin, on the 14th of February, 1833, took a quit-claim deed from Ludowick Minaker of all his right in the land. This was taken before Perrin sold to Burnham. Perrin swore upon the trial that he never thought that Minaker had any title, though he took this quit-claim from him to extinguish any claim of his. It was proved that Ludowick Minaker was never in possession of the lot.

The plaintiff relied on the fact of these defendants holding under a title confirmed at least by Ludowick Minaker's quit-claim deed, as estopping them from denying in these actions that he was seised of the land, and also relied upon a recital of Minaker's title in that deed which Perrin took from Ludowick Minaker. This was a deed executed only by Minaker, the grantor. It did not profess to convey the land, but only "to sell and make over to Perrin all Minaker's right, title, interest, claim and demand," which land it stated, "was devised by will to the said Ludowick Minaker by Michael Kesler, the original grantee of the Crown."

The learned Chief Justice told the jury that he saw no evidence of seisin in Minaker which could support a verdict for the demandant on the plea, and a verdict was given for the tenant in each case, leave being reserved to the demandant to move to enter a verdict for her if the court should think the seisin of Minaker was proved.

It was agreed by the tenants that if the court should refuse to enter verdict for demandant, a nonsuit might be entered.



*C. S. Patterson* obtained a rule *nisi* in each case to set aside the verdict for the tenant and enter a verdict for demandant, or a nonsuit, on the leave reserved, or for a new trial for misdirection.

*Cameron*, Q. C., shewed cause.

*Richards*, Q. C., and *C. S. Patterson*, supported the rules, citing *Matheson v. Mallock*, 13 U. C. R. 354; *Davenport v. Davenport*, 7 C. P. 401; *Potts v. Meyers*, 14 U. C. R. 508; *Ham v. Ham*, Ib. 497; *Young v. Raincock*, 7 C. B. 319.

ROBINSON, C. J., delivered the judgment of the court.

The defence of the tenant in each case against the claim of dower made by the demandant as widow of Ludowick Minaker being rested upon the alleged want of seisin in her husband, it was necessary for the demandant to prove his seisin. He had never been in possession of the property. On the part of the demandant, an attempt was made to prove that Kesler, the patentee of the Crown, had devised the land to him, but no will was produced. There had not been such searches made, I thought at the trial, as would entitle the demandant to give secondary evidence of the contents of the will, but that is not material to be considered, because there was no evidence whatever that any one had seen the will spoken of by one witness, or any will of Kesler, after Kesler's death, and such evidence it appeared to me was absolutely necessary; and the witness who swore that he had seen Kesler execute a will, and had witnessed it, gave no evidence whatever of the contents of the will in any respect, nor was there any evidence of the contents given by any one. As to any direct proof therefore of the alleged devise, there was none.

Then can it be said that there was such evidence given as would make out a title by estoppel. The deed from Ludowick Minaker to Perrin was relied on for that purpose, because the tenants in these two cases, it has been argued, claimed through Perrin. But the doctrine of estoppel cannot be applied to such a conveyance as that which was made by Ludowick Minaker to Perrin, for that deed was taken merely by way of confirmation of title. It not only

contains no general warranty or covenants of seisin, but it does not in terms profess to convey the property. It contains no words granting the estate, but only conveys *all the interest and title of Minaker in it*. Upon plain principles forming part of the doctrine of estoppel, such a conveyance does not estop the grantor, or those claiming under him, as has been frequently decided in England, and in several cases in this court, for the very deed on the face of it gives notice that the grantor does not assume to do any thing more than to transfer any right that he has, without holding out the assurance that he has a good estate.

But it has been insisted that in this case there is a difference, because of the words in Minaker's deed to Perrin, which state that this land was devised by will to Ludowick Minaker by Michael Kesler. We do not think we can give to this statement the effect of an estoppel which can supply proof of Minaker's seisin as against these defendants. Estoppels must be precise in their nature. Now here the mere statement by Minaker that Kesler had devised the land to him, not even saying for what interest, whether for life or in fee, could hardly amount to an estoppel, when we find it in a deed by which Minaker does not assume to convey the fee in the land, but only to give up his interest or claim in it; and, besides, we see by the evidence that the defendants hold in fact under a claim of title derived from Secord, to whom Kesler had conveyed in his life time, which title is altogether inconsistent with any title that could be made out under a devise from Kesler. It is evident from the testimony of Perrin, who took that deed, as well as from the evidence in the cause, and from the nature of the conveyance itself, that the deed from Ludowick Minaker was merely taken to fortify the title against any claim that Minaker might have been disposed otherwise to set up under a will of Kesler; and if a quit-claim or release of that kind could not be taken without subjecting the releasee to a claim of dower, merely by the fact of his taking such release, and thereby acknowledging, as it were, that the releasor was seised in fee, the operation of such a deed would often work great injustice. The case in this court of Dittrick v. O'Connor (7 U. C. R. 448) is against

what the demandant has argued for in that respect, and I am still of the opinion which I expressed in that case.

In *Wannacott v. Fillater*, in this court, (11 U. C. R. 51,) I ventured to state in regard to the issue upon a plea denying the husband's seisin, that if it had been shewn (which in that case it was not) that the tenant in an action of dower claimed under a title derived from her husband, that would remove all difficulty. Admitting that to be correct, which was extra-judicially advanced in the case then before the court, it would not warrant our extending the principle to the present case, where it cannot be truly said that the tenants are holding under a title derived from Minaker, merely because one of the persons in the chain of title springing from a conveyance by Kesler, had thought it prudent to take a quit-claim from Minaker, who it seems had made some pretence of claiming under a will of Kesler, which he could neither produce nor prove.

The case of *Davenport v. Davenport* (7 C. P. 401) was cited by Mr. Richards in the argument of this rule, but it rather confirms than opposes the view we have taken of this case, for the learned Chief Justice there says, "It is as tenant of the freehold that the defendant defends this action, *and the only title he has* is that derived from the demandant's husband." We cannot say that here.

In our opinion, the demandant did not entitle herself to a verdict upon the plea denying her husband's seisin. The parties have agreed that if this should be our conclusion, the verdict for the tenant should be set aside, and a nonsuit entered instead, which we think should be done.

Rule absolute.

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## HUNTSMAN V. THE GREAT WESTERN RAILWAY COMPANY.

*Excessive damages—New trial.*

Verdict for £50 against a railway company for putting the plaintiff off a train, though the inconvenience occasioned to him was trifling, and the conductor acted *bonâ fide*, under an impression that the plaintiff had not paid his fare, and without harshness or violence. New trial granted for excessive damages.

This was an action for putting the plaintiff off the defend-



ants' passenger train running from Grimsby to St. Catharines, after the plaintiff had paid his fare.

*Pleas*:—1. Not guilty, by statute. 2. That the plaintiff was not carried as a passenger for reward, to be paid to the defendants.

At the trial, at Niagara, before *Burns, J.*, the station-master at Grimsby proved that on the 7th of November, 1859, he sold a ticket to the plaintiff to proceed as far as St. Catharines, and also saw the plaintiff go on board of the train. He knew the plaintiff very well, and the ticket he sold to him was the only ticket sold that day. Another person proved that he saw the plaintiff buy the ticket, and give it to the conductor on the platform before going on the train. Two other persons stated that they saw the plaintiff give something to the conductor, which they took to be a ticket. The plaintiff was put off the train some three or four miles from Grimsby, because he could not shew a ticket, he insisting that he had given his ticket to the conductor.

On the part of the defendants the conductor was examined, who stated that he knew the plaintiff very well, and that the plaintiff had not given him any ticket that day. He admitted that he did receive a ticket on that occasion, but said that it was from another person. The brakesman stated that he saw another person than the plaintiff give the conductor a ticket. The impression on the mind of the conductor was that another person in company with the plaintiff had gone on the train, and that their plan was if possible to pass themselves off on the one ticket. All the witnesses stated they thought the conductor was acting sincerely, and not in any manner harshly with the plaintiff, and that the plaintiff, as he lived at St. Catharines, might without any trouble, or but little inconvenience to himself, have paid the fare when demanded by the conductor in the train, and then have sued for the money back. The plaintiff had only to wait at Grimsby for about four hours until the next train passed, and this he did, and returned home by the evening train.

The learned judge told the jury that the weight of evidence shewed that the conductor was mistaken in supposing

that he had not received a ticket from the plaintiff, but as one of the witnesses for the plaintiff expressed himself, he thought the plaintiff to blame also, when it appeared that the conductor was acting upon what he at the time thought to be true. He told the jury that the plaintiff was entitled to some small sum as compensation, but further than that they ought not to go: that the plaintiff had no particular or urgent business which required his attendance at St. Catharines, or he would not have hesitated to pay again when it was demanded of him; and that the whole matter appeared very like a speculation, when it was found that the conductor must have been mistaken.

The jury gave a verdict for the plaintiff for £50.

*Irving* obtained a rule *nisi* to set aside the verdict on the ground of excessive damages.

*Freeman*, Q. C., shewed cause, citing *Smith v. Woodfine*, 1 C. B. N. S. 660.

*C. Robinson* supported the rule, and cited *Hamblin v. The Great Northern R. W. Co.*, 2 Jur. N. S. 1122.

ROBINSON, C. J., delivered the judgment of the court.

The only question is whether, on considering the cause of action and the evidence, we should in the exercise of our discretion grant a new trial for excessive damages, the verdict being for £50.

The plaintiff, taking all he attempted to prove to be true, took a passage in defendants' railway train at Grimsby to go to St. Catharines, where he lived, a distance rather less than twenty miles.

He had bought a ticket and paid for it, and gave it to the conductor on the platform before setting out. When the conductor came to the passengers to see their tickets, just after the train left Grimsby, the plaintiff told him he had already given up his ticket to him. The conductor insisted that he had not, being, as he stated, under the impression that it was another person who had done so; and as the plaintiff declined to pay, the conductor put him off the train three miles on the road from Grimsby, and the plaintiff was

detained three or four hours until the defendants' evening train came along and took him up.

The evidence shewed that the conductor was probably mistaken, but that he acted under the impression that the plaintiff was endeavoring to impose upon him. For all that appeared, a very few shillings would have made up to the plaintiff all the damage he actually sustained.

The conductor's conduct was not violent or harsh, and not wilfully wrong. Under such circumstances, the verdict of £50 was improper, because it was outrageous.

It could scarcely be more unreasonable to give £50 damages against the defendants, because one of their servants had by mistake given a parcel which they were carrying, worth 20s., to the wrong person.

We think there should be a new trial on payment of costs. (a)  
Rule absolute.

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### DAVIS V THE GREAT WESTERN RAILWAY COMPANY.

*Expulsion from train—Evidence of the contract to carry—Production of ticket, how far conclusive—Suspicious circumstances.*

In an action against a railway company for putting the plaintiff off a train, defendants pleaded that they had not received the plaintiff to be carried for reward, as alleged. It appeared that the ticket offered by the plaintiff to the conductor must have been sold about sixteen months before, and that the conductor refused to take it on that account. It was proved also, that on a previous occasion the same plaintiff had presented an old ticket, and on its being rejected had paid his fare.

*Held*, reversing the judgment of the county court, that the circumstances being calculated to excite suspicion, the mere production of the ticket was not sufficient to entitle the plaintiff to succeed, but that it should have been left to the jury to say whether the plaintiff had procured it fairly, or was attempting an imposition.

APPEAL from the county court of the county of Lincoln.

The declaration alleged that the defendants received the plaintiff to be carried as a passenger on their railway, for reward, from St. Catherines to the Suspension Bridge; yet that they did not carry, but wrongfully expelled him from the train, and refused to permit him to proceed on his journey.

Defendants pleaded—1. Not guilty, by statutes 4 W. IV., ch. 29, sec. 26, 16 Vic., ch. 99, sec. 10.

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(a) Upon a second trial the jury gave a verdict for £45, which was not moved against.



2. That the plaintiff did not become and was not received by the defendants as a passenger in one of their carriages, to be carried and conveyed by them for reward, as in the declaration alleged.

At the trial the following evidence was given :

*Peter Nelson*, sworn.—Is in the employment of defendants. From the number of the ticket now produced it must have been sold on the 28th of December, 1858. Tickets from St. Catherines to the bridge are only issued to the American side. The charge to the bridge is fifty cents, back thirty-eight cents.

*Cross-examined.*—The figure on the ticket must have been altered or taken off. Some of the tickets have the mark "good for this day only," others have no such mark. A clip on the ticket shews it must have passed through the conductor's hands. Witness was not station-master in 1858, at St. Catherines; cannot state to whom the ticket was sold.

*Joseph A. Woodruff*, sworn.—Was in the cars going from St. Catherines to Clifton on the 4th of May. Plaintiff was on board. A ticket must be brought to the American side. Plaintiff was sitting on the seat next to me. Witness put his initials on the ticket produced. Conductor refused to take the ticket, alleging that it was too old. Witness advised the plaintiff to go off rather than be turned off. He was put off near the bridge, on the St. Catherines' side of the bridge, as witness thinks. The up train on the road must have passed him soon. Witness met Friesman, who is a painter at St. Catherines, and was going down with the plaintiff. Friesman is a man of good standing in his business. Plaintiff is in charge of a large establishment at the Falls. The conductor seemed determined to put off the plaintiff, alleging it was his orders.

*Cross-examined.*—Witness put his initials on the ticket immediately on Davis's return to the bridge. He saw the ticket a few days before, and observed the date. The putting off took place between four and five o'clock in the afternoon. Witness did not see him at the bridge that evening. Plaintiff might have other tickets. The ticket now produced witness swears is the same one. The up train was an accommodation one from the bridge, and must have passed him. Witness has not crossed since the suit was brought. The limitation clause on tickets is put on since the occurrence.

*John Canoline*, sworn.—Says the plaintiff told him the same day he was put off the train, and witness took the plaintiff up to Thorold village, for which the plaintiff paid him five shillings. Witness lives between Thorold station

and the village. It was about four o'clock in the afternoon. Trains mixed passed sometimes and do not stop at times; passenger trains are attached at times.

*William David Fitch*, sworn.—Recollects Davis coming to his place with Canoline. The plaintiff required a team to go to the Falls at once, and paid me \$4 to send him there. His driver would take him out in an hour or less.

*Gavin Nicholson*, sworn.—Was in the train a short time before with plaintiff, and a difficulty occurred about a ticket. Plaintiff presented a ticket, which conductor refused as it was an old one. The conductor came twice. Davis then paid his fare, and conductor demanded the ticket, which he destroyed. The plaintiff is in a large business at the Falls during the season.

*Robert Nicholson* swears to the same fact as his brother, Gavin; and states further that he advised the plaintiff to pay his fare, and that on being urged a second time he paid it. The conductor had a man with him, and threatened to throw him off.

*Irving*, for defendants, moved for a nonsuit, on the ground that no proof was offered that Davis bought the ticket, and therefore there was no cause of action to plaintiff.

This objection was overruled, and the learned judge charged the jury, that the plaintiff was entitled to recover a reasonable amount of damages, which should be awarded as if between private parties.

The jury found £50 damages, and 5s. for two tickets, which was reduced at the request of plaintiff's counsel to £49 15s. damages, and 5s. on the second count, which was for money had and received.

A rule *nisi* was obtained for a new trial for misdirection, which after argument was discharged, and the defendants appealed.

*Irving*, for the appellants, cited *Skinner v. London, Brighton &c. R. W. Co.* 5 Ex. 787.

*Cameron*, Q. C., contra, cited *Marshall v. York, Newcastle &c. R. W. Co.*, 11 C. B. 655; *Collett v. London and North Western R. W. Co.* 16 Q. B. 984.

ROBINSON, C. J., delivered the judgment of the court.

It ought, we think, to have been left to the jury in this

case to find whether the plaintiff had or had not in fact procured a ticket for the passage which he took on this occasion; not that such evidence would be required under ordinary circumstances, and that the absence of it should as a matter of course prevent the plaintiff's recovery, but there were in this case several circumstances that were well calculated to excite suspicion. The old date of the ticket, and the circumstance of the same plaintiff having on other occasions endeavoured to pass off old tickets, and having given up the attempt and paid money for his passage when he found them questioned; these facts made it proper that the jury should have been called on to consider whether the mere possession of this old ticket, without the plaintiff attempting to shew how he came by it, or by the others which he had attempted to pass, did or did not satisfy them that he had come lawfully into the train, having paid, or intending to pay his fare, or whether he was not attempting to impose upon the conductor.

We cannot but remark with regret upon the exorbitant amount of damages given in such a case against the defendants, who were not otherwise concerned in this matter than through the act of their conductor; and when the conductor, for all that is shewn, acted in no violent or intemperate manner, but, as we should in reason suppose, only did what he thought his duty required of him. It cannot surely be supposed that these officers of the railway feel themselves at liberty to submit without question to every attempt that may be made to impose upon them. They must, in justice to their employers, act upon their best judgment; and it surely was a very strong circumstance, that this same plaintiff had on similar occasions, when he had advanced old tickets, paid his fare in money to avoid being put out. (a)

The jury should have been asked, we think, to consider whether there were not various ways by which people might possess themselves of railway tickets, which had either never been bought, or which had already been used, and so could not legally be used again.

Appeal allowed.

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(a) See the last case.



## GRIFFITH ET AL., EXECUTORS OF THOMPSON, V. WARD. (a)

*Action for maliciously suing out attachment—Plea, appeal in the suit still pending.*

*Declaration*, for maliciously causing a steamer of the plaintiffs to be attached in the United States to answer a pretended claim of the defendant, alleging that the suit in respect of said claim had been determined in favour of the plaintiff.

*Plea*, that before the commencement of this suit, defendant appealed from the decision against his claim, which appeal was still pending.

*Held*, on demurrer, plea good.

DECLARATION, in the name of Charles Thompson, the testator, as plaintiff, that the defendant having no reasonable or probable cause for believing that the plaintiff was indebted to him in the sum of \$12,000, and the plaintiff not then being indebted to the defendant in the said sum of money, or any other sum, maliciously caused a certain steamer called the "Kaloolah," then being the property of the plaintiff, to be seized and attached by virtue of an attachment, maliciously issued from the district court of the United States for the district of Michigan, by and at the instance of the defendant, to answer the said supposed claim or demand of the defendant against the plaintiff for the sum of \$12,000, which said sum was not then, nor was any part of it due and owing by the plaintiff to the defendant: that the suit or libel of the defendant against the plaintiff in the said court, in respect of the said supposed claim or demand of the defendant against the plaintiff had been dismissed with costs by the said court, and the said suit was determined in favour of the plaintiff; by reason of which wrongful and malicious seizure the plaintiff was obliged to expend, and did expend a large sum of money in and about procuring the release of the said steamboat called the "Kaloolah," and for a long space of time lost and was deprived of the use thereof, and of large gains which he otherwise would have derived therefrom.

*Plea*, that after the libel of the defendant against the plaintiff had been dismissed in the said district court of the United States of America for the district of Michigan, as in the declaration alleged, and before the commencement of

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(a) This case was decided in Trinity Term, 1859, but accidentally omitted in the reports of that term.

this action, to wit, on the 9th of March, 1857, the defendant prosecuted an appeal against the decision of the said district court to the circuit court of the said state of Michigan, as by the law he was permitted to do, and at the time of the commencement of this action the said appeal was still pending, and undecided in the said circuit court; and that at the time of the commencement of the action the said suit of the defendant against the plaintiff was not, nor is it now finally determined against the said defendant.

*Demurrer*, that the fact of the appeal in the said plea set forth having been prosecuted as therein alleged, does not affect the plaintiff's right of action in this cause.

*Eccles*, Q. C., and *Hector Cameron*, for the demurrer, cited *Sherwood v. O'Reilly*, 3 U. C. R. 4.

*Anderson*, contra, cited *Yeaton v. the United States*, 5 Cranch 281; *United States v. Preston*, 3 Peters 66; *Burt v. Place*, 4 Wend. 591.

ROBINSON, C. J., delivered the judgment of the court.

We have found no case decided, nor any discussion upon the question, whether, when a person indicted for an offence, or arrested in a civil suit, has been acquitted upon his trial, he can sustain an action for the malicious prosecution, or malicious arrest, relying upon such acquittal as "a legal determination" of the proceeding against him, although an appeal from the judgment in his favour is at the time pending undetermined in a higher tribunal.

Upon principle our opinion is that till the appeal has been determined the party is not in a situation to bring his action for a malicious prosecution or arrest, or, as happens to be the case here, for maliciously suing out an attachment against his property; for in such a case the original cause cannot be said to be at an end, and that repugnancy and inconvenience may occur which has led to the establishment of the rule that the original cause must be shewn to have been disposed of.

It would be manifestly absurd and inconsistent if the plaintiff should be allowed to proceed in this action and recover,

on the ground that the steamboat in question had been maliciously seized and detained, without any reasonable or probable cause, and it should be afterwards determined upon the appeal, which was pending before and at the time this action was brought, (for that is what the plea states,) that the defendant had a good cause for seizing and detaining the vessel.

It certainly seems to be entirely inconsistent with the language of the court in *Fisher v. Bristow*, (Doug. 215,) that this action should be suffered to be brought, and proceeded in while the appeal is pending. We refer also to *Bac. Abr. "Action on the Case" H.*, note; *Robins v. Robins*, (1 Salk. 15,) *Chitty on Pleading*, Vol. II., p. 436, note *y.*; *Mellor v. Baddeley*, (2 Cr. & M. 678,) *Skinner v. Gunton*, (1 Saund. 229, *a.*) *Yeaton v. The United States*, (5 Cranch 281,) *Burton v. Place*, (4 Wend. 591.)

Upon the propriety of allowing an action of this kind, founded on malice, to proceed in the name of the executors of the plaintiff, I have still some doubt, but that is not now in question.

Judgment for defendant on demurrer.

#### GRIFFITH ET AL., EXECUTORS OF THOMPSON, V. WARD.

*Pleading—Demurrer to plea—Judgment on demurrer—Application to withdraw demurrer and reply.*

An action for maliciously causing a steamboat of one T. to be attached, was brought to trial, and resulted in a verdict for the plaintiffs, which was set aside and a new trial granted. Before the second trial defendant obtained leave to plead that his suit had been appealed, and was therefore undetermined when this action commenced, and this plea upon demurrer was held good. A year afterwards, the new trial not having taken place, the plaintiffs applied to rescind the order allowing the plea, or to withdraw the demurrer and reply matter which had arisen since the plea, on affidavit shewing that the defendant's appeal had since been dismissed, and that he resided out of the jurisdiction, so that if compelled to bring a new action the plaintiffs might lose the costs incurred. Judgment had not been entered on the demurrer.

The court allowed the plaintiffs to withdraw the demurrer and reply, on payment of costs, without sanctioning any particular replication.

*Eccles*, Q. C., obtained a rule on the defendant to shew cause why the order made in this cause for leave to add a plea should not be rescinded, and the plea added in pursuance



thereof struck out of the record, on grounds disclosed in affidavits; or why the plaintiffs should not have leave to withdraw their demurrer to the said added plea, and to reply thereto matter which had arisen since the pleading of the said added plea, or otherwise, as they might be advised.

The action was brought by Thompson against the defendant, Ward, for maliciously causing a steamboat of Thompson's to be attached in the State of Michigan, without any probable cause for so doing. The defendant pleaded not guilty.

Thompson having died after the commencement of the suit, it was revived in the name of his executors, and taken to trial; and a verdict was found for the plaintiffs for \$9000, but a new trial was granted on payment of costs.

After the new trial was granted, and before it took place, namely, on the 21st of March, 1859, leave was given to the defendant to add a plea, which was demurred to, and judgment given in favour of the plaintiffs.—See ante, page 31.

It was now shewn, in support of the present application, that the appeal was afterwards dismissed with costs: that this defendant, Ward, then appealed to the Supreme Court of the United States from the judgment of the Circuit Court of the District of Michigan, and that such appeal to the Supreme Court had also been dismissed with costs, so that the suit commenced by Ward against the late Charles Thompson, and in which the attachment issued, had now been finally determined in the court of last resort.

The plaintiffs shewed by affidavit that Ward resided in the United States, and that if they were obliged to bring a new suit against him, it might be impossible to serve him with process, so as to bring him within the jurisdiction of this court, and that a large amount of costs incurred by the plaintiffs in bringing this suit to trial, when the verdict was obtained, would be lost.

No proceedings had taken place in this suit since the judgment on the demurrer, and the suit had not been entered for trial since the new trial was ordered.

*Anderson* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The present application is in effect to allow the plaintiffs to withdraw a demurrer, on which judgment has been pronounced by the court, but not entered of record, and allow the plaintiffs to reply to the added plea, setting forth the final determination of the attachment suit in the United States against this defendant, Ward, which took place in the Supreme Court of the United States in December Term, 1859, since the judgment on demurrer in this action was pronounced.

We should be willing to do any thing in our power to place the plaintiffs in a just position, and have no objection to allow them to withdraw their demurrer, and reply to the plea, which we have adjudged to be good, of course on condition of paying costs; but we do nothing more than allow them to reply, without sanctioning their replying the matter which arose after he had brought his action, or any other matter that may be demurrable. They must take their chance of the replication being demurred to. That we cannot save them from.

We think we cannot properly make an order for rescinding the order under which the plea was pleaded, after that plea has been adjudged good upon demurrer, as it undoubtedly was.

It is often made a defence by plea that a credit was given which had not expired when the action was brought, and if such a plea should be pleaded we could not order it to be taken off the file, in order to allow the plaintiff to go on with his action after the credit had expired. This is a case the same in principle. A plaintiff has no right to sue till his cause of action is complete, and it will be urged that the question is always whether his action could lie when he brought it.

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## HAMMOND V. HEWARD AND GRIER.

*Money had and received—Partnership—Dissolution before receipt—Count for negligence added at trial—Right to make such amendment—Nolle prosequi, effect of.*

Defendants, H. and G., who had been in partnership as brokers, were sued for money had and received, the cause of action being for the proceeds of two notes made by the plaintiff, payable to them, to be discounted, which it was alleged that they had received and not paid over. G. allowed judgment to go by default. It appeared that the plaintiff had handed the notes to G., acting for the firm, to get them discounted for him: that they were endorsed in the name of the firm while it continued; and that after the partnership had been duly dissolved G. sold them, and received the proceeds, which he applied to pay a debt of his own, contracted by him in the name of the firm, H. not being aware of the sale. It was objected that the plaintiff could not recover against both defendants on this evidence, and the plaintiff was then allowed at the trial to add a count charging that defendants as brokers received the notes to negotiate for the plaintiff and pay him the proceeds, but that by their neglect of duty said notes, before they became due, were endorsed by defendants, and came so endorsed into the hands of one G., who sold the same to one A., and applied the money to his own use; and that the plaintiff was afterwards compelled to pay the notes to A. The plaintiff entered a *nolle prosequi* as to Grier, and defendant refused to plead to this count, objecting to its being allowed. The jury having found a general verdict for the plaintiff:

*Held*, that the plaintiff could not recover against both defendants on either count, for as to the first count the money was not received by the firm, but by G. alone, after the dissolution, and without the knowledge of H.; and as to the second, it was no breach of duty in G. to discount the notes, that being the purpose for which he received them, and for the wrong committed by him in not paying over the money received after the partnership had ceased, H. was not liable.

*Held*, also, that the plaintiff having entered a *nolle prosequi* on both counts as against G., the verdict, being general, could not have been maintained as against H., though the second count was in tort.

*Held*, also, that the amendment was improperly allowed, not being necessary to determine the real question in controversy in the existing suit, but the substitution of a new cause of action.

ACTION on common counts, for money lent, money paid by the plaintiff to defendants' use, money had and received by defendants to plaintiff's use, money due on an account stated, and money due for interest.

The plaintiff, in his declaration against the defendant Heward, suggested that the writ of summons was specially endorsed under the provisions of the Common Law Procedure Act of 1856, as follows—"August 4th, 1856.—The following are the particulars of the plaintiff's claim. To the amount of two notes made by the plaintiff, payable to the order of the defendants, at three months from this date, and by plaintiff delivered to the defendants on or about this date, and by defen-



dants on or soon after this date discounted, and the proceeds thereof taken and received by them for the plaintiff, who afterwards paid the said notes to the holder thereof; but the defendants, although they received such proceeds for the use of the plaintiff, have never paid the same to him or accounted to him therefor; and to recover the same the plaintiff now brings this suit. The amounts of said two notes were £100 and £150, and the proceeds thereof received by the defendants as aforesaid amounted to £250, which is the amount of the plaintiff's claim in this suit exclusive of interest and damages. The plaintiff claims interest from the 4th day of August, 1856, until judgment. (The notice endorsed for defendants to appear to the writ was also set forth,) and the record then proceeded, "to which said writ the said Stephen Heward has appeared, but the said Robert John Grier has not appeared thereto, and interlocutory judgment hath therefore been signed against the said Robert John Grier, in this action, for default of appearance to the said writ, but no execution was issued thereon; and the plaintiff now declares herein against the said Stephen Heward as above contained; and the plaintiff claims £1000.

On the 2nd of March, 1860, the defendant Stephen Heward pleaded that he never was indebted as in the said declaration alleged, and on the 23rd of March the plaintiff took issue on this plea.

At the trial, before *Hagarty, J.*, at Toronto, the defendant Grier was called as a witness for the plaintiff, and he proved that he and the defendant Heward, in August, 1856, were in partnership as brokers in the city of Toronto: that while they were partners the plaintiff deposited with him, acting for the firm, the two notes which were produced, dated the 4th of August, 1856, payable at three months, one for £100 and the other for £150, and a mortgage for £2,200: that the plaintiff wished to have the mortgage sold to raise money, but to meet a present demand wished the amount of the notes to be raised: that towards the end of September, or beginning of October, an amount of £250 was raised by sale of the notes, endorsed by the firm of Heward and Grier: that the proceeds, according to the plaintiff's instructions, were to be

forwarded to him, but that these instructions were not complied with, and that the proceeds were applied to pay a debt contracted in the name of the firm.

On cross-examination this witness admitted that the plaintiff did his business with him: that the notes were endorsed with the name of the firm while the partnership existed, for the purpose of offering the notes for discount, but that they were not discounted till after the partnership was dissolved; that it was near the maturity of the notes when cash was received for them, and then the partnership was at an end: that the amount received was applied to pay his own debt, though contracted in the name of the firm of Heward and Grier: that a notice of dissolution of partnership was signed on the 15th of September, 1856, and published a few days after, at the same time notifying that the business would thereafter be carried on by Mr. Heward; and that such notice was published before the money was raised on the notes. He further stated that the defendant Heward had no knowledge of his disposing of the notes, but he thought he knew that they had them and the mortgage: that the notes and papers remained for some days in the same bank as previously, after the dissolution: that each had a key of the safe; and that they remained occupying the same office for some days, he thought till after the money was raised on the notes.

A Mr. Anderson, with whom the notes were negotiated, was called by the plaintiff, and proved that he took them from Grier on the 2nd of October, 1856, and paid him £250 for them; and that he had since been paid the amount in April following through his solicitor. He stated that he met Grier in the street: that the notes were then offered to him but he refused to purchase: that Grier pressed him to do so, alleging that he wanted the money by twelve o'clock that day: that he went to his, Anderson's house, and deposited the plaintiff's mortgage as a security, and then that the money was paid to him: that about an hour after, he, Anderson, met Heward in the street, and told him he had purchased two notes of his firm: that Heward asked from whom, and he told him from Grier: that Heward said he

was not aware that Grier had any notes that he could sell, and he repudiated the whole transaction.

The plaintiff having closed his case, *M. C. Cameron*, for the defendant, objected that the action was for money had and received by the firm, and that the evidence shewed that the firm was dissolved before the money was received; and that the evidence of payment of the notes by the plaintiff was not sufficient.

*A. McDonald*, for the plaintiff, then applied to add a count to the declaration, charging the loss as arising from neglect of the defendants as brokers, and to enter a *nolle prosequi* as to Grier.

The learned judge allowed this amendment, the defendants' counsel protesting against it, but not urging that it prejudiced him substantially on the merits in defending. The learned judge offered to adjourn the case for several days, or to allow the defendant to plead and demur to the count if required, but the defendants' counsel refused to plead, or to urge any further defence at that time in the action.

The plaintiff's attorney then added a count to his declaration as follows:

And also, for that the defendants were before the commencement of this suit, to wit, on the fourth day of August, 1856, brokers, and carrying on business as such in the city of Toronto, and while they were such brokers the plaintiff, on or about the day and year last aforesaid, delivered to the defendants two promissory notes made by the plaintiff, and respectively dated the 4th day of August, 1856, and respectively payable to the order of the defendants at the Bank of Upper Canada, at three months after the date thereof, one of which notes was for the sum and of the value of £100, and the other thereof for the sum and of the value of £150, which said two notes the plaintiff delivered to the defendants as aforesaid, as his brokers, for the special purpose of the defendants negotiating or discounting the same, and raising money thereon for the plaintiff, and paying such money when obtained by them to the plaintiff, or in the event of not negotiating or discounting the same, then returning the said notes to the plaintiff; and the defendants then, as such



brokers of the plaintiff as aforesaid, accepted and received the said two notes for the said special purpose, and in consideration of and for reasonable reward to the defendants in that behalf then promised, agreed, and undertook to use, and it thereupon became the duty of the defendants to use, due and proper care and diligence in negotiating or discounting the said notes for the plaintiff, and duly to pay or account to the plaintiff for the money to be obtained by the defendants on and for the said notes, and in the event of not negotiating or discounting the said notes, then to return the same to the plaintiff. Yet the defendants, wholly disregarding their said promise, and their duty aforesaid, as brokers of the plaintiff as aforesaid, did not use due and proper care and diligence in negotiating or discounting the said notes, but, on the contrary thereof, so negligently and carelessly acted in that behalf, that by and through the negligence and carelessness of the defendants in that behalf, the said two notes, before the same became due, were endorsed by the said defendants, and having been so endorsed, came by and through the negligence and carelessness of the defendants, and without any notice to the plaintiff, into the hands of a certain person, to wit into the hands of one Robert John Grier, without any value being received therefor by the said defendants, and afterwards the said Robert John Grier endorsed and negotiated, and discounted the said two notes, before the same became due, and then delivered the same so endorsed as aforesaid to one William James Anderson, who then, without any notice of the premises, paid to the said Robert John Grier thereon and therefor the sum of £250, which money the said Robert John Grier then retained and applied to his own use, whereby the plaintiff thereupon became liable to pay the said notes to the said William James Anderson, according to the tenor and effect thereof. And the plaintiff further avers, that the said William James Anderson continued to hold the said notes until the same became due, and when the same became due the said William James Anderson compelled the plaintiff to pay to him, and the plaintiff did then pay to him, the said William James Anderson, the sum of £250, in full satisfac-

tion and discharge of the said two notes, which money has never been paid or made good to the plaintiff by the defendants in any way, to the damage of the plaintiff of £500.

That count so added as an amendment was annexed to the record, and on the margin was an entry signed by the judge, "The count annexed put in at the trial, upon the order of the judge to make the amendment, and the plaintiff pleads *nolle prosequi* as to the defendant Grier."

The jury rendered a verdict for the plaintiff, and £302 10s. damages, being for the amount of plaintiff's claim, £250, and for interest, £52 10s.

*M. C. Cameron* obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, the record and evidence disclosing a cause of action against the defendants jointly, and not severally, and the plaintiff, having brought the action against both the defendants, by entering a *nolle prosequi* as to one defendant discharged the other; or why the said verdict should not be set aside and a new trial had between the parties, the verdict being contrary to law and evidence, and for misdirection of the learned judge who tried the cause, in this—that he charged the jury, that notwithstanding the money was received by the defendant Grier after the dissolution of partnership between him and the defendant Heward, the latter was liable; and also in directing the jury that the notes mentioned in the declaration having been received by the partners during the existence of the partnership, an improper use of them by one of the partners after the dissolution could make the other liable, as if the wrong had been done before the dissolution; and also because there was no proper issue on the record in this cause, there being no plea applicable to the amended or added count of the declaration; and also because the judge at *nisi prius* had no power to authorise the adding of a new cause of action; or why the judgment in this cause should not be arrested, on the ground that the entry of the *nolle prosequi* against the defendant Grier discharged the defendant Heward. He cited *Boyle v. Webster*, 21 L. J. Q. B. 202; *Commercial Bank v. Rey-*

nolds, et al., 3 U. C. R. 360; Haris et al. v. Dunn, 18 U. C. R. 382.

*A. Macdonald* shewed cause, and cited *Samuel v. Judin*, 6 East 333; *Salmon v. Smith*, 1 Saund. 206; *Bowden v. Horne*, 7 Bing. 716; *Tennyson v. O'Brien*, 5 E. & B. 497; *May v. Footner*, Ib. 505; *Wilkin v. Reed*, 15 C. B. 205; *Emery v. Webster*, 9 Ex. 242; *Webster v. Emery*, 10 Ex. 901; *Brennan v. Howard*, 25 L. J. Ex. 289.

McLEAN, J.—The plaintiff's original cause of action against the defendants, was for the proceeds of two promissory notes placed in their hands as brokers for the purpose of raising money by discounting them, for the use of the plaintiff. The special endorsement claims a specific amount as due by the defendants jointly for money received by them on the discount of these notes, and not paid over to the plaintiff. The evidence, however, shewed that no money was received upon the notes till after the dissolution of partnership between the defendants, and then only by one of the defendants, without the authority or knowledge of the other. Grier, the one who received the money, was used as a witness in behalf of the plaintiff, and was obliged to acknowledge, on cross-examination, that he had taken the notes out of the vault after the dissolution of partnership, and had got them discounted, and applied the proceeds to the payment of a debt of his own, which he had contracted in the name of the partnership.

It was evident the plaintiff on such testimony could not recover as for money had and received to the plaintiff's use against the defendants jointly; and then, by leave of the learned judge who tried the cause, the plaintiff was allowed to amend his declaration, by adding a count charging the defendants jointly with negligence as brokers, in allowing the notes placed in their hands by the plaintiff for the purpose of being negotiated, to come into the hands of *one Robert John Grier*, without any value being received for them, though endorsed in the name of the defendants; and alleging that *Robert John Grier* afterwards endorsed, and negotiated and discounted said notes, and received therefor



the sum of £250, and retained the same, and applied it to his own use.

Now by the evidence it appears that the notes were originally placed by the plaintiff in the hands of Grier, while in partnership with the other defendant, Heward, for the express purpose of having them discounted by any one who would advance money on them. There could be no negligence or misconduct, therefore, on the part of Heward, in allowing these notes to remain in Grier's hands for the purpose for which they were received by him, during the continuance of the partnership, and no negligence of the defendants jointly for which any action can be maintained. The notes were taken after the close of the partnership, and negotiated by Grier, without the knowledge or consent of his former partner, Heward, and that is charged against both the defendants as negligence in their character as brokers, and a breach of duty on their part. There could be no duty resting on the defendants jointly after their dissolution of co-partnership, in reference to any thing thereafter to be done in matters connected with their former business, and no responsibility could devolve upon Heward for any improper act of Grier in negotiating the notes after that period. He might be responsible for their safe keeping, if they remained in his hands after the dissolution of partnership, as he was thereafter to carry on the business of the firm, as appears by the notice given on the partnership being dissolved.

The original count on which the plaintiff proceeded to recover the proceeds of the notes from the defendants jointly, still forms part of the record, and the discharge of one of the defendants from the cause of action therein set forth must operate as a discharge of his co-partner also. The *nolle prosequi* entered as to Grier must be a discharge from the whole cause of action in that count against the defendants as joint contractors; and if the count which has been added at the trial can be regarded as founded on promises, it must amount to a discharge on that count also. But if it must be taken as a count for a tort, then a *nolle prosequi* might be entered as to one of the defendants, without dis-

charging the other. There is no plea on the record applicable to that count, and there is no distinct evidence that the defendant Heward ever saw the notes, or had them in his individual custody. There is only the statement of Grier, whose conduct appears to have been most fraudulent, that he *thought* Heward knew that they had the notes for the purpose of being discounted.

As to the added count, I think it must be taken as complaining of a wrong done by the defendants jointly, from which wrong the plaintiff might release one of them by the entry of a *nolle prosequi*, without discharging the other.

As to the amendment by adding a distinct cause of action, the 291st section of the Common Law Procedure Act of 1856, gives any judge sitting at *nisi prius* power to amend all defects and errors in any proceeding in civil causes, whether there is any thing in writing to amend by or not, and it directs that all such amendments as may be necessary for the purpose of determining *in the existing suit* the *real question in controversy between the parties* shall be so made.

Now the real question in controversy in the existing suit, as it was brought to trial, was the recovery of a certain sum of money, being the proceeds of two notes placed in the defendants' hands for the purpose of being discounted, which proceeds the plaintiff alleges the defendants received, but did not pay over. The amendment was not in any matter in the existing suit connected with the receipt of money by the defendants to the plaintiff's use, but was the substitution of a new cause of action for a tort, instead of the original suit in *assumpsit*; or, in other words, substituting a different action for the existing suit which the jury were sworn to try. It appears to me that this was an amendment not contemplated by the legislature or sanctioned by the statute, and that it must be set aside, and of course the verdict rendered upon it falls to the ground.

The defendant after the amendment was made did not further defend the suit, and there is no plea on the record applicable to the new cause of action. The verdict nevertheless is general on both counts, and I suppose the *nolle prosequi* is intended to be entered on both as against Grier.

It has the effect, however, of discharging both of the defendants, the contract declared on being a joint one, and therefore the verdict cannot stand as to one. The verdict therefore on both counts must be set aside.

But if the amendment were unobjectionable, it does not appear to me that the cause of action set forth in it is sustained by the evidence of Grier, the witness on whose testimony the plaintiff relied to make out his case. It is alleged that the notes were placed in the hands of the defendants, for the special purpose of the defendants negotiating or discounting the same, and raising money thereon, and paying the same over to the plaintiff, or in the event of not negotiating the same, then returning the said notes to the plaintiff; and that the defendants undertook to raise money for the plaintiff on the said notes, or to return them to him; and as a breach of their duty in this behalf it is stated that *they* so negligently and carelessly acted, that by and through *their* carelessness and negligence the two notes, before they became due, were endorsed by the defendants, (to whom they were made payable,) and having been so endorsed that they came by and through *the negligence and carelessness* of the *defendants* into the hands of one *Robert John Grier*, without any value being received therefor by the defendants, and afterwards the said Robert John Grier negotiated and discounted the said two notes before the same became due, and then delivered the same to one *Wm. J. Anderson*, who paid to the said Robert John Grier therefor the sum of £250, which the said Robert John Grier retained and applied to his own use, whereby the plaintiff became liable to pay the amount of the said notes to Anderson, and was obliged to pay the same. Now the notes are shewn by the evidence of Grier to have been received from the plaintiff *by him* for the express purpose of being discounted, and he also proves that *he* did get them discounted, and *received the money on them*,—precisely what was intended to be done; and so far there was no breach of duty on the part of the defendants. But Mr. Grier, when no longer a partner of the defendant Heward, committed *the wrong* in not paying over the money which he had received for the notes without the knowledge



of his former partner. It can be no cause of complaint against the defendant Heward, that notes given to him and Grier to be negotiated were negotiated by Grier, for that is the express object for which they were received. The non-payment to the plaintiff of the proceeds is the only substantial ground of complaint, and if the defendant Heward is liable on that account, the count for money had and received to the plaintiff's use ought to have been sufficient to enforce payment.

The rule must be made absolute to set aside the verdict, and the amendment allowed at *nisi prius*.

If the grounds of action stated in the amendment are sufficient to render the defendant Heward liable, the plaintiff's remedy is still open to him on these grounds.

BURNS, J.—According to the case of *Boyle v. Webster*, (21 L. J. Q. B. 202,) if the plaintiff had entered the *nolle prosequi* as to the defendant Grier before adding the new count, the effect would have been that it amounted to a discontinuance of the whole action. The plaintiff had declared upon a joint contract, and his writ of summons was framed in such a way, with the special endorsement, that if no appearance had been entered he would have been entitled to judgment against both defendants.

Independent of the question as to the propriety of changing the form of action into the demand contained in the new count which was added at the trial, we have this difficulty presented, namely, that the entry of the *nolle prosequi* as to one defendant was a virtual abandonment of the whole cause of action, as the record then stood, being against both defendants; and by the amendment the action was changed into an action upon another description of demand, though both counts are still retained upon the record. If the action had originally been of a character in which the *nolle prosequi* as to one defendant did not alter the suit or character of the demand against the other defendant, then the case would have been different, and a judge might properly exercise his judgment as to allowing an amendment against the defendant who

remained. Here, however, an amendment was allowed, having the effect of a new action entirely against the defendants, in which a *nolle prosequi* might be entered. The incongruity now presented by this record is, that on the first count of the declaration the effect of the *nolle prosequi* is that it is a discontinuance of the action upon that count against both, and with respect to it both defendants are out of court, and the amended count, which might properly admit of a *nolle prosequi* as to one of the defendants, remains upon the record with the other. The new count might no doubt be added to the first, but the difficulty is in allowing the record to be amended by a *nolle prosequi* as to one of the defendants, which properly applied to the new count, but did not apply to the other count.

It appears to me this is not such an amendment as the legislature contemplated, and in the discretion given to the courts to review we should set aside both the verdict and the *nolle prosequi*. If the plaintiff can then maintain his action on both counts, he may proceed with it, and if he cannot, his course is not to enter a *nolle prosequi* against one defendant, but to discontinue the whole action and bring it against the defendant Heward alone; or he may get rid of the first count in some way, so as to render the action in form such as to enable himself correctly to enter a *nolle prosequi* as to one of the defendants upon the new count.

THE CHIEF JUSTICE gave no judgment.

Rule absolute.

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OSBORNE, ASSIGNEE OF THE SHERIFF OF MIDDLESEX, v.  
W. K. CORNISH ET AL.

*Bond to the limits—Death of sheriff—Right of his successor to assign.*

The plaintiff declared, as assignee of G., the sheriff of Middlesex, on a bail bond to the limits given to H., the late sheriff, alleging that after the making of the bond H. died, and that the defendant on several occasions departed from the limits; but it was not stated whether the departure took place before or after the death of H., or the appointment of G., or whether the bond had been allowed.

*Held*, (affirming the judgment of the county court,) that the declaration was bad, as for all that appeared the departure might have been at such a time as to render the late sheriff liable, and if so his successor could not assign the bond.

APPEAL from the county court of Wentworth.

The plaintiff, as assignee of William Glass, Esq., sheriff of the county of Middlesex, sued William K. Cornish, Francis E. Cornish, and Simpson H. Graydon, upon a bond given by them to James Hamilton, Esq., who then was sheriff of the county of Middlesex, to secure him against the escape of William K. Cornish, one of the defendants, who had been arrested and admitted to the limits, upon a writ of *ca. sa.*, issued out of the county court of the county of Middlesex, and endorsed to levy £12 18s. 3d., besides costs.

The declaration stated that after the making of the bond, and before it was assigned to Osborne, the plaintiff in this suit, the obligee in the bond, Mr. Sheriff Hamilton, died, and that after the making of the bond, the defendant William K. Cornish, the execution debtor, *did on divers days and times* depart from the limits of the gaol of the county of Middlesex, whereby the bond became forfeited, and that thereupon the said William Glass, as sheriff of the said county of Middlesex, afterwards, on the 9th of September, 1859, and after the death of the late Sheriff Hamilton, duly assigned the said bond to this plaintiff, Osborne, under the seal of his office of sheriff, according to the form of the statute, &c.

Whether the debtor departed from the limits in the life time of the late sheriff, (Hamilton,) or not until after the appointment of Mr. Glass to his office as his successor, or in the interval between the two events, did not appear upon the record.

The defendants demurred to the declaration, upon the ground that upon the facts, as they were stated, the new sheriff, Glass, had no authority to assign the bond, and that the plaintiff, Osborne, could not maintain this action upon the bond as his assignee.

The learned judge of the county court held that the new sheriff, under the circumstances set forth in the declaration, had no power to assign the bond, and he gave judgment for the defendant on the demurrer, which judgment was appealed from.

*Spohn*, for the appellant, cited 3 & 4 W. IV., ch. 99, Imp. Act; Consol. Stats. U. C., ch. 24, secs. 25, 33; 20 Vic., ch.



57, sec. 35; Dwarris on Stats., 563, 557, 550, 551, 632; Selw. N. P. 609; Metcalfe v. McKenzie, et al., 2 U. C. R. 103.

*Read*, Q. C., contra, cited Lush Prac. 536, 560, 561; Abney et al. v. White, 1 Carth. 301, 302; Gregson v. Heather, 2 Ld. Raym., 1455; McPherson v. Hamilton, 5 O. S. 490; Watern on Sheriff, 20; Sewell on Sheriff, 570, 175.

ROBINSON, C. J., delivered the judgment of the court.

In a note to the case, of Kitson v. Fagg, (1 Str. 60,) it is said that in a case of Harris v. Ashley, before Lord Mansfield at *nisi prius*, he had denied the soundness of the decision in Kitson v. Fagg, that an under-sheriff's clerk could not legally assign a bail bond in the name of the sheriff; and that his lordship held in the latter case, with the approbation of his brother judges, that an assignment under the seal of office made by the under sheriff's clerk was valid, it being usual to make such assignments in that manner. It is not stated in the declaration before us whether this bond for the limits had been allowed or not by the judge. If it had been, then the late sheriff being discharged from all liability, there would seem to be no good reason why the sheriff for the time being might not assign the bond, as it would be a mere matter of form, to enable the plaintiff in the action to sue; and if Lord Mansfield's opinion be correct, the seal of office to such an assignment, made in the name of the sheriff for the time being, might be held sufficient.

Our statute, 3 W. IV., ch. 8, sec. 33, makes the deputy-sheriff, after the death of his principal, competent to do all that belongs to the office of sheriff, in the name of such deceased sheriff, until another sheriff has been appointed and sworn into office.

We have it stated here that after the making of this bond, Sheriff Hamilton died; that after the making of this bond, Cornish, on divers days and times, departed from the limits, and that the bond became thereby forfeited; but it is not stated whether the forfeiture occurred in Hamilton's time or after his death, and before Glass was appointed to succeed him and had been sworn in, or afterwards.

When this bond was given the Common Law Procedure Act of 1856 was in force, and regulated the proceedings in regard to bonds for the gaol limits, and under the 305th section of that act, the plaintiff in the execution, upon the condition of the bond being broken, might require the sheriff to assign to him; and the assignee of the bond, according to that statute, might maintain an action in his own name upon the bond, which action the sheriff was disabled by the statute from releasing, but upon executing such assignment the sheriff was to be thenceforth discharged from all liability.

Now, if the former sheriff, for all that appears, may have been liable before his death, by reason of the debtor having already departed from the limits, or if after his death, and before the new sheriff was appointed and sworn into office, the debtor departed, which would render the late sheriff's sureties liable, or if, though the new sheriff had been appointed and sworn into office, the prisoners in custody upon civil process at the time of his appointment had not yet been assigned over, as the law requires, by indenture to the custody of the new sheriff, we apprehend the former sheriff would be liable.

It would follow then, we think, as a consequence, that so long as the estate of the second sheriff could be held liable, it should not be in the power of the new sheriff to assign the bond to the plaintiff.

In Fortescue's Reports, p. 364, it is said, the sheriff, though he be out of office, may assign the bail bond given to him, describing himself as late sheriff; and in Petersdorff's Treatise on Bail, p. 221, it is said, but without referring to any authority, "If the sheriff die before assignment of the bond, the plaintiff must sue as at common law, in the name of the sheriff, as the executors appear to have no authority to assign it."

Then comparing the English Statute, 4 Anne, ch. 16, sec. 20, with the 305th section of our C. L. P. Act, we do not see why the sheriff, as mentioned in both statutes, is not to be taken to mean the sheriff to whom the bond was given, and perhaps also, in this country, his deputy up to the time of the new sheriff being appointed and sworn in.

We wish the matter was plainer under the statute than it

is, but our opinion is that the plaintiff must sue in the name of the executors of the late sheriff, for that they have no power given to them to assign, and because there is nothing on the record to shew us that the departure was not at such a time as would make the former sheriff or his estate liable.

In our opinion therefore the judgment given below should be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

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WOODRUFF ET AL., EXECUTORS OF SAMUEL ZIMMERMAN,  
v. MILLS.

*Mortgage—12 Vic., ch. 73—Sale by sheriff of equity of redemption—Purchase by one of several devisees of mortgagee—Effect of on covenant to guarantee the mortgage—Proof of will.*

A. made a mortgage of lands to Z. and the defendant, and the defendant assigned his interest therein to Z., covenanting by the same instrument for the punctual payment by the mortgagor of one half of the principal and interest. To an action brought on this covenant by the executors of Z., defendant pleaded that a judgment had been recovered against the mortgagor on said mortgage, for the benefit of Z., who afterwards devised all his real estate to the plaintiffs, and that the equity of redemption having been duly sold under said judgment, was purchased by the plaintiffs, as such executors and devisees, and conveyed to them by the sheriff, whereby the debt became satisfied, and defendant was discharged. In another plea it was alleged that the equity of redemption was purchased by M., one of the plaintiffs, and the conveyance thereof taken to him for the benefit of himself and the other plaintiffs, as such executors and devisees.

*Held*, 1. That the plaintiffs, as devisees of Z., were assignees of the mortgage within the 12 Vic., ch. 73, and that the purchase by them of the equity of redemption must have the same effect as if it had been by Z. in his life time.

2. That the effect of the statute was to work a satisfaction of the mortgage, though the provision is merely that the mortgagee, &c., buying, shall give a release to the mortgagor; and *semble*, that the defendant, instead of setting out the facts, might have pleaded payment in the ordinary form.
3. That upon the facts stated in the second plea, the case must be looked upon as if all the executors had been purchasers.
4. That the mortgage being satisfied, defendant was also discharged from his covenant; and therefore that the second plea (which was demurred to) shewed a good defence.

The will of Z. not having been properly proved by one of the subscribing witnesses, and the objection having been taken, the court could not enter a verdict for defendant on the leave reserved, but granted a new trial on payment of costs.

The plaintiffs sued on a deed made on the 18th of July, 1855, between the defendant and the testator, Samuel Zimmerman, in which it was recited that by a mortgage made on the 7th of July, 1855, certain lands were conveyed by John



Applegarth and William Applegarth to this defendant, Mills, and the testator, Zimmerman, subject to be redeemed by making certain payments: that the principal and interest were on the 18th of July, 1855, wholly unpaid, and that Zimmerman had agreed to become purchaser thereof, (that is, of the whole,) for the price of £1895.

And it was stipulated by that deed of the 18th of July, 1855, that in consideration of the premises, and of £3750, the said Samuel Mills sold and assigned to Zimmerman, his heirs and assigns, all his right, title and interest in the lands and premises mortgaged, being the south-easterly half of lot 11 in the second concession, and the south-easterly 50 acres of lot 12, in the second concession of East Flamborough, together with the said mortgage, and all the moneys secured thereby.

And by the same indenture Mills covenanted with Zimmerman, his heirs and assigns, that he would guarantee the punctual payment, as the same should fall due, of one-half of the principal money, and one-half of the interest secured by the said mortgage: that is, half of each payment. By the mortgage of the 7th of July, 1855, the mortgagors covenanted with Mills and Zimmerman, to pay them, their heirs, executors, &c., £3750, with interest, at 6 per cent., as follows: £375 in one year from the date, and £375 at the expiration of each of the nine next succeeding years from the date of the said mortgage, with interest to be paid half-yearly from the date of the indenture, excepting the first half-year, for which no interest was to be charged.

The declaration alleged that the mortgagors did not on the 7th of July, 1858, nor at any time before, or since, pay to Zimmerman in his life time, nor to the plaintiffs, as executors since his death, the sum of £375, being the third instalment, with interest on the sum of £3000, which became due on the 7th of July, 1858. And that the defendant had, notwithstanding, not paid to the said Zimmerman in his life time, nor to the plaintiffs as executors since his death, the one-half of the said instalment, which so became due on the 7th of July, 1858, nor the said interest, &c.

The defendant pleaded that after the making of the cove-

nant a judgment was recovered in the court of Common Pleas, in the names of Samuel Zimmerman and the defendant as plaintiffs, but at the instance and for the benefit of Zimmerman, against the mortgagors, John Applegarth and William Applegarth, upon the said mortgage, and afterwards the said Samuel Zimmerman, by his last will and testament, executed in due form of law to pass real estate, devised all his estate and interest in the land, real estate, and premises mentioned in the said mortgage, to the plaintiffs; and such proceedings were afterwards had upon the said judgment, at the instance of the plaintiffs, as executors of the said will, that the equity of redemption of the said John Applegarth and William Applegarth in the said mortgaged premises was duly sold by the sheriff of the county of Wentworth, before the commencement of this suit, under a writ of execution sued out at the instance of the plaintiffs, as such executors, upon the said judgment, and at such sale the said plaintiffs bid off and purchased the said equity of redemption, and took a conveyance thereof from the said sheriff, on behalf and for the benefit of themselves, as the executors and devisees, as aforesaid, of the said Samuel Zimmerman, whereby the debt payable by the said indenture of mortgage became satisfied and discharged, and the defendant was thereby discharged from the said covenant, and all causes of action in respect thereof.

At the trial, which took place at Cayuga, before *McLean*, J., a second plea was added, stating the same facts up to the time of sale of the equity of redemption, and alleging that at such sale the plaintiffs, by Richard Miller, acting for himself and the other plaintiffs, bid off and purchased the said equity of redemption, and took a conveyance thereof to the said Richard Miller, for the benefit of himself and the other plaintiffs, as executors and devisees, as aforesaid, of the estate of the said Samuel Zimmerman, whereby the debt made payable by the said indenture of mortgage became satisfied and discharged, and the defendant was thereby discharged from the said covenant, and all causes of action in respect thereof.

The plaintiffs took issue on the first plea, and pursuant to leave given at the trial took issue on and demurred to the second plea, on the ground that the defendant Mills was not a surety, but a principal debtor, and was not discharged by the dealing between Miller and the sheriff, and that the plea shewed that he bought at sheriff's sale after the defendant's breach of covenant, and he was therefore liable for nominal damages at all events; and on the further ground, that Miller could not purchase the estate so as to bind his co-executors or trustees.

The covenant declared on being admitted by the plea, the defendant began by producing a judgment in favour of Mills and Zimmerman, plaintiffs, against John Applegarth and Wm. Applegarth, for £410 15s., and £5 3s. 11d. costs, signed 31st January, 1857, The amount specially endorsed on the summons, as appeared by the judgment, was £408 15s., principal and interest, due on a covenant contained in a deed dated 2nd July, 1858, for payment of £3750 and interest.

The deputy-sheriff of Wentworth proved the receipt of execution against the lands of the Applegarths on the 10th of June, 1857, and its return to Messrs. Miller & Connolly, the attorneys for the plaintiffs, Mills and Zimmerman; the receipt of a writ of *ven. ex.* from the same attorneys, and the sale of the interest of John and William Applegarth in the premises mentioned in the mortgage, to Richard Miller, one of the plaintiffs, and one of the attorneys in the suit, by whose directions the sheriff was guided in advertising and selling the property. It was shewn that the writ of *fi. fa.* and also the *ven. ex.* had been returned to Messrs. Miller & Connolly, the attorneys who issued the same, and that notice had been given to them to produce them on the trial. They were not produced when called for under the notice, and Cameron, Q. C., on behalf of the plaintiffs, objected to any proceeding under the *ven. ex.* being given in evidence till the writ should be produced or accounted for.

The sheriff's deed, dated 20th November, 1858, after reciting the writs of *fi. fa.* and *ven. ex.*, under which the sale of the land took place, stated that under such writs against the lands and tenements of John Applegarth



and William Applegarth, he had sold the same by public auction to Richard Miller, of the town of St. Catharines, Esquire, for £190, being the highest bid for the same, and that in consideration of the said sum to him paid by the said Richard Miller, he, the said sheriff, granted, bargained, and sold to him, his heirs and assigns, all the right, title and interest of the said John Applegarth and William Applegarth, in and to lot, &c., to have and to hold the same to him, the said Richard Miller, his heirs and assigns for ever.

A deed having been taken by the plaintiff Miller, who acted as one of the attorneys for the plaintiff, and purchased the property on behalf of himself and the other plaintiff in this suit, as executors of the estate of Samuel Zimmerman, the defendant was allowed to go into evidence of what occurred at the sale, and that the property, or rather the equity of redemption of John and William Applegarth in the property, had been purchased by the plaintiffs through one of their number, Mr. Miller, at the sale by the sheriff. A letter from Mr. Miller, dated November 16th, 1858, directed to the sheriff, was put in, instructing the sheriff to prepare a deed and memorial to him, and informing him that he had purchased the lands for the benefit of the plaintiff: that he was one of the executors of Zimmerman, and as such acquitted the sheriff from the payment of the money made on the *ven. ex.*; and undertaking to pay the amount of the sheriff's fees thereon. Besides the evidence afforded by this letter of the purchase of the mortgaged premises by Mr. Miller, on behalf of the estate of Zimmerman, a witness called by the defendants, who was present at the sale, stated that he heard Mr. Miller, when purchasing, declare that he was buying in the property for the benefit of the estate, and that it was no interest to him: that just before the property was sold, the defendant asked Mr. Miller what he intended to do, and Mr. Miller replied he was going to have the property sold; that the defendant was a bidder at the sale, and did not seem to be acting in concert with Mr. Miller.

To prove that the mortgaged property, in consequence of the assignment of the defendant, and the sale of the equity

of redemption of J. and W. Applegarth, and the purchase thereof by Mr. Miller for the plaintiff, was vested in the plaintiff, the will of the late Samuel Zimmerman was produced from the Court of Chancery, but none of the subscribing witnesses to its execution were present, and the defendant's counsel called witnesses who proved the handwriting of the several plaintiffs, and of the official principal of the court of probate, to affidavits attached to the will, proving the will for the purpose of obtaining probate.

It was admitted that all the subscribing witnesses to the will were living, and the plaintiff's counsel objected that the will could only be proved by one of them, and that in the absence of such testimony the will could not be received in evidence. Though there could be no doubt that the will was that of Samuel Zimmerman, and that the plaintiffs were devisees in trust of all his real estate, yet as there was no proof of the taking of the affidavits before the official principal, and the learned judge considered the testimony of one of the subscribing witnesses the only legal mode of proving the due execution of the will, he directed a verdict to be rendered for the plaintiffs, for £292 19s. 7d., being the amount due on the mortgage, which the defendant by his covenant had guaranteed the payment of, it being at the same time understood, that on the defendant moving for a new trial, the judgment of the court might be taken on all the facts on which the defence was rested.

The plaintiffs contended that the defendant's covenant was wholly unconnected with the original mortgage, and that they were entitled to recover the amount from the defendant, notwithstanding the sale of the premises in the mortgage, and the purchase by Mr. Miller.

*Freeman*, Q. C., obtained a rule *nisi* calling upon the plaintiffs to show cause why the verdict obtained in this cause should not be set aside, and a verdict entered for the defendant, or why a new trial should not be granted, or other order made according to the justice of the case.

*M. C. Cameron* shewed cause.

The demurrer and rule *nisi* were argued together.

ROBINSON, C. J., delivered the judgment of the court.

The plea is founded on a provision in our statute, 12 Vic., ch. 73, (Consol. Stats. U. C., ch. 22, secs. 257, 259,) which was in force at the time of the sheriff's sale stated in the plea. That statute provided that an equity of redemption in real estate might be sold by the sheriff upon a writ of *fi. fa.* against the mortgagor's lands, and in the third section of the act it is provided, that any mortgagee of the lands so sold, or of any part thereof, or the heirs or assigns of such mortgagee, being or not being plaintiff or defendant in the judgment wherein the writ of *feri facias* was issued, may be the purchaser at such sale, and may take, hold, and enjoy the same estate, benefit, &c., as such purchaser, as any other purchaser not interested in the land as mortgagee. "*Provided always, that if the mortgagee of the said premises shall become the purchaser thereof, he shall give to the mortgagor a release of the debt for the payment of which the mortgage may be given.*" It is contended that Miller and the other executors of the mortgagee, Zimmerman, (who purchased out the other mortgagee, Mills, and thus became sole holder of the mortgage for his own benefit,) are within the act as *assignees* of this mortgage, being, as averred in the plea, devisees of all the estate of Zimmerman in the land mortgaged. And the equity of redemption being sold upon an execution taken out by them on the judgment, which the testator, the mortgagee, had obtained against the mortgagors, and being bought by Miller, one of the executors, on behalf and for the benefit of himself and the other executors, as devisees of Zimmerman, as the plea charges, the effect is the same as if Zimmerman had lived and bought the equity of redemption himself at the sale. We agree with the defendant so far.

The next question then is, if Zimmerman, having purchased the equity of redemption, were still living, and had nevertheless brought his action on the covenant in the mortgage to recover the mortgage debt from the mortgagors, could he have been allowed to recover in this court? We think he could not, for that the effect of the statute in that case would have been to work a satisfaction of the debt, and



to compel us to regard the mortgage as satisfied. We incline to the opinion that the defendants might in such an action have pleaded payment, for the intention of the legislature we take to be, that when the legal holder of a mortgage buys the equity of redemption at a sheriff's sale, he is to be looked upon as having bid the sum which he did as a sum which he was willing to give above the debt for which he held a charge upon the land: in other words, that he bid the amount of the incumbrance which he held, and so much over, and that, therefore, when he receives a conveyance of the equity of redemption, his debt is paid. If in that way the defence of payment in the ordinary form could be maintained, as we think it could, then of course pleading the facts truly, from which the court could draw the inference of payment, would be a good plea in substance.

The provision of the act is only that the mortgagee so buying the equity of redemption on an execution, shall give to the mortgagors a release of the mortgage. It does not say in words that the debt shall be regarded or treated as satisfied, but surely that must be understood as included in the provision, or why should the mortgagee be compelled to give a release of the debt? The exacting a release is a mere consequence; it is carrying the provision farther in order to free the estate; but the provision can only be looked upon as founded on the principle that the purchase by the mortgagee amounts to satisfaction.

Then as to the peculiarities in this case, we think, clearly, that construing the statute reasonably we should look on the case as if all the executors had been purchasers, considering the facts stated in the plea.

Then we are to look at the fact that this is not an action by the executors of Zimmerman against the mortgagor upon the mortgage, but an action on a distinct covenant in a different deed made by the defendant, binding himself that he will "guarantee the punctual payment, as the same shall fall due, of the principal money and interest secured by the mortgage: that is, half of each payment;" and the averment in the declaration is, that the mortgagors did not pay £375 and interest, due in July, 1858.

These facts create a case of the first impression. Our opinion is that the plea is a good defence by Mills, for we must give a covenant a reasonable construction. He is only bound to guarantee half of what the mortgagors were bound for, (we suppose because Zimmerman would not buy the mortgage without such guarantee;) and if we are bound, as we think we are under the statute, to treat the mortgage as satisfied when the holders of the mortgage became the purchasers of the equity of redemption, then it is satisfied as regards Mills, as well as satisfied by the mortgagors, for there is no liability remaining such as he covenanted should be discharged.

The evidence of the will was not strictly legal, we think, and as the objection was made, and the learned judge held that it was entitled to prevail, and so that the pleas were not proved, and the plaintiff on that account entitled to a verdict, which was accordingly rendered in his favour, the utmost we can do is to order a new trial, that the defendant may supply the evidence on another trial; but it must be on payment of costs.

The objection of the want of proof by a subscribing witness to the will was a rigid objection under the circumstances, but there was nothing to dispense with the proof, for it was necessary to see the contents of the will. The probate does not seem to have been produced, nor such a notice given as under the statute would have entitled the defendant to use it as evidence.

Judgment for defendant on demurrer.

Rule absolute for new trial, on payment of costs.

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## BURTON ET AL. V. BELLHOUSE.—(TWO SUITS.)

*Verbal sale of goods—Interpleader—Change of possession—Description of Goods—20 Vic., ch. 3.*

On an interpleader issue to try the title to two locomotives, it appeared from the finding of the jury, that in September, 1858, when they were half finished, the plaintiffs verbally agreed with G., the manufacturer, to buy them from him for \$16,000, payable as he might require it, for which they were to be finished by him; and on the 3rd of January, 1859, by deed reciting this arrangement, G. conveyed them to the plaintiffs. The defendant claimed under an execution issued after the agreement, and when that was made there was an execution in the sheriff's hands, at the suit of a third party, which was subsequently paid.

- Held*, 1. That by the verbal agreement the property passed, and that the chattel mortgage act did not apply, a change of possession being impossible under the circumstances.
2. That the execution in the sheriff's hands clearly could not affect the plaintiff's claim as against the defendant.
3. That if it were necessary to determine that point, the locomotives were sufficiently described in the deed of the 3rd of January, set out below.

INTERPLEADER issues to try the title to two locomotives.

These cases were tried at the last fall assizes, at Hamilton, when in one of them the jury not agreeing were discharged, and in the other a verdict was found for the plaintiffs, the claimants. The court set that verdict aside, and granted a new trial upon the evidence. Both cases came on again for trial, before *Burns*, J., at the last assizes held at Hamilton. The evidence on this occasion was essentially the same as at the first trial.

The plaintiffs claimed to be the owners of the two locomotives, firstly, under an arrangement which they contended had been made with Daniel C. Gunn, the manufacturer, in September, 1858. Previous to that time the plaintiffs had endorsed notes, &c., for Gunn to a large amount, which notes were outstanding, held by the Bank of Montreal. The locomotives, in September, 1858, were not more than half finished, if so much, and the plaintiffs contended that they had made a verbal agreement with Gunn, by which they purchased the locomotives for \$16,000, which was to be paid from time to time, as Gunn might require, and Gunn was to go on and finish the engines, &c., for the plaintiffs.

The plaintiffs claimed title, secondly, by a deed of bargain and sale of the locomotives from Gunn to them, dated



3rd of January, 1859, which deed recited the arrangement of the September previous.

The plaintiffs insured the locomotives, as their property, on the 2nd of March, 1859. On the 7th of March, 1859, Gunn made an assignment for the benefit of creditors, and in the schedule to that deed the locomotives were inserted as valued at \$24,000, and the plaintiffs' claim upon them as \$16,000, leaving \$8000 as a surplus available to the creditors of Gunn's estate. At the trial, Gunn swore that the sale was made to the plaintiffs at \$16,000, but that he thought they were worth \$24,000, and would sell for that sum, and if they did he supposed the plaintiffs would allow any surplus beyond the \$16,000 to go to his creditors, and for that reason he inserted it in that manner in the assignment for creditors. One of the plaintiffs prepared the assignment, and acted under Gunn's instructions in the matter.

At the time of the alleged agreement, in September, 1858, there was one writ of execution in the hands of the sheriff against Gunn unsatisfied, and which was paid after the assignment was made. Besides the notes, &c., endorsed by the plaintiffs on Gunn's account, he, Gunn, owed many other persons, and among them the defendant, who subsequently obtained judgment and issued execution, as also did other creditors.

At the close of the plaintiffs' case, the defendant's counsel in the first case moved for a nonsuit, on the grounds,

1st. That the arrangement of September, 1858, could not pass the property, for that in a case of this kind, where it was to remain in Gunn's possession, under the chattel mortgage act it could only be by deed.

2. That the deed of the 3rd of January, 1859, reciting the arrangement of September before, could not revert to and make good the previous verbal agreement, if there was one; and by the terms of this deed the property was not transferred, the words not being sufficient to do so.

3. That an execution in the sheriff's hands, before the 20th of September, 1858, unpaid, and in fact not discharged until after the assignment for creditors on the 7th of March,

1859, would enure to the benefit of other creditors, and prevent any sale to the plaintiffs.

At the close of the second case, the defendant's counsel, besides taking the former objections, raised another—that the property was not sufficiently described in the deed of the 3rd of January, 1859, to comply with the chattel mortgage act, no locality being given, nor any description by which they might be identified.

That deed recited that on or about the 22nd of September, 1858, Gunn had contracted to construct for the plaintiffs two locomotive engines: that \$16,000 had been advanced thereon: that said locomotives were complete and ready for delivery, but for convenience had been left on the premises of said Gunn: that it might be doubtful whether in the absence of actual delivery a formal assignment and registration thereof were not required; and to remove such doubts, the said Gunn declared that the said locomotives were the property of the plaintiffs, and so far as he could or might he assigned the same to them.

The learned judge put the following questions to the jury:

1st. Whether Gunn was or was not insolvent on the 20th of September, 1858, or on the 3rd of January, 1859.

2. Whether the deed of the 3rd of January, 1859, truly recited the transaction of the 20th of September, 1858, as stated therein. And whether the transaction was that of money loaned and advanced to Gunn, and security taken for it, or whether it was an absolute sale by Gunn and purchase by the plaintiffs.

3. Whether the transaction was *bonâ fide* between the plaintiffs and Gunn—that is, a sale at the time—or whether it was in the nature of a transfer to the plaintiffs in trust for and to benefit Gunn; or was he to derive any advantage from it after the transaction completed.

The jury answered all these questions in the plaintiff's favour, by saying that Gunn was not insolvent either on the 20th of September, 1858, or on the 3rd of January, 1859; that the transaction was a *bonâ fide* sale to the plaintiffs, and not in trust for Gunn in any way.

Whereupon a verdict was entered for the plaintiffs.

*M. C. Cameron* obtained rules *nisi* for a new trial in both cases. He cited *Lunn v. Thornton*, 1 C. B. 379; *Atkinson v. Bell*, 8 B. & C. 282.

*Cameron*, Q. C., and *Freeman*, Q. C., shewed cause, and cited *Harris v. Rickett*, 4 H. & N. 1; *Wood v. Bell*, 5 E. & B. 772, 791; *S. C. In Error*, 6 E. & B. 361; *Baker v. Gray*, 17 C. B. 462; *Williams v. Fitzmaurice*, 3 H. & N. 844; *Clarke et al. v. Spence*, 4 A. & E. 448; *Bell v. Bank of London*, 3 H. & N. 730; *James v. Griffin*, 2 M. & W. 622.

ROBINSON, C. J., delivered the judgment of the court.

As to the first objection, that the transaction in September, 1858, between these parties could not pass the property, we think we must hold that the property could and did pass, if the agreement were such as was proved, and as the jury found it to be.

The distinction between such cases as *Mucklow v. Mangles*, (1 Taunt. 318,) *Atkinson v. Bell*, (8 B. & C. 277,) and other cases of that class, and the later cases cited by Mr. *Freeman*, of *Clarke et al. v. Spence*, (4 A. & E. 448,) *Baker v. Gray*, (17 C. B. 462,) and *Wood v. Bell*, (5 E. & B. 772,) seems to be now fully recognised. We refer to *Baker v. Gray* only for the discussion of the principle which it contains.

It is true that the agreement in September, 1858, was a verbal agreement, but this is not an action *to charge* the plaintiffs or defendant *upon a contract* for the sale of a chattel. It is a question raised upon the fact of a sale having been accomplished, and that a sale may be perfected by verbal agreement as well as by writing cannot be doubted. It is true the engines continued in the possession of Gunn, but they were incapable of delivery over consistently with the objects of the agreement. They necessarily remained in his hands till completed. No ground for suspicion arises from the possession not being changed, for it could not be changed under the circumstances, and the chattel mortgage act does not, as we think, apply to such a case, where the engines were necessarily to remain in Gunn's shop to be completed.



The second objection relates to the sufficiency of the deed, and is unimportant if the contract of September, 1858, was capable of vesting the property in the plaintiffs, as we think it was.

The third objection we think is clearly not tenable. Any executions in the sheriff's hands against the goods of Gunn, at the suit of other parties than the defendant, would only have the effect of disabling Gunn from disposing of the property to the prejudice of the plaintiffs in such executions, but this action is not a contest with any such creditor, but with one who took out execution after the alleged sale.

We think the property may be held to have been sufficiently described in the assignment of January, 1859, if that were necessary to be determined.

This disposes of the several exceptions moved as grounds of nonsuit.

Upon the first point we have had a good deal of hesitation, though we think the authorities do lead to the conclusion upon it that we have expressed.

Rule discharged in each case.

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## WHITEHOUSE V. ROOTS.

*Covenant on mortgage given for purchase money—Equitable plea—Title defective owing to prior mortgage upon the land—Replication, assignment of such mortgage.*

To an action on a covenant for payment of mortgage money defendant pleaded, on equitable grounds, that the mortgage was of certain land: that before executing the same the plaintiff was or professed to be owner of said land free from incumbrances, and as such owner proposed to defendant to purchase the same: that defendant, relying upon the representations of the plaintiff that he was the owner of the said land, free from incumbrances, purchased the same from the plaintiff for £300, and paid him £75 on account, and thereupon the plaintiff executed a deed to him containing the usual covenants for title free from incumbrances, and defendant executed the mortgage declared on to secure the balance of purchase money: that the plaintiff was not then the owner of said land free from encumbrances, but there was a mortgage to the Trust and Loan Company, including this and other lands, theretofore executed by one G. W., which fact was not communicated to defendant, but was concealed from him at the time of said sale, otherwise he would not have purchased said land, or executed the mortgage declared on: that the said mortgage to the Trust and Loan Company not having been paid, the land was sold under their power of sale, whereby defendant lost and was deprived of said land, and his improvements thereon, together with the money already paid by him; and defendant alleged that the plaintiff was wholly insolvent, so that he could recover nothing from him, and that it would therefore be inequitable to allow him to compel payment of the balance of said purchase money.

The plaintiff demurred to this plea; and replied that before action he had assigned the mortgage and the money secured by it for a valuable consideration, and that the assignees, for whose benefit the suit was brought, had no notice or knowledge of the facts pleaded: that the conveyance of said land to defendant was executed by one W. and not by the plaintiff; and that at the execution thereof defendant had notice of the mortgage to the Trust and Loan Company, &c., &c.

*Held*, on demurrer, that the plea was insufficient, for the covenants for title in the deed, which must be assumed to be qualified, would afford no ground of action for the incumbrance complained of, not created by the plaintiff; and there was no allegation of fraud on the plaintiff's part which would entitle defendant to relief in equity.

*Held*, also, that if the plea were sufficient the replication contained a clear answer to the defence set up by it.

*Quere*, whether the plea was bad as shewing an equitable defence not admissible under the C. L. P. Act.

DECLARATION, on defendant's covenant to pay the plaintiff £56 5s. on the 28th of February, 1859, with interest on £112 10s. from the 28th of February, 1858.

*Plea*, on equitable grounds, that the deed in the declaration mentioned is a certain indenture of bargain and sale by way of mortgage, made by the said defendant to the plaintiff, of the lands and premises following, that is to say, (describing them by metes and bounds, being five acres of lot 19, in the broken front concession of the township of Westminster,) which said indenture of mortgage is subject to a proviso for

making the same void on payment to the plaintiff of the sum of £225, with interest, at the times and in manner therein specified, and contains a covenant on the part of the defendant for the payment of the sum of money in the declaration mentioned to the plaintiff.

And the defendant further saith, that heretofore, and before the making of the said indenture of mortgage by the defendant, the plaintiff was or professed to be the owner of the said land, with other lands adjoining thereto, free from all incumbrances, and as such owner proposed to the defendant to purchase the said five acres of land hereinbefore described; and the defendant, relying upon the statements and representations of the plaintiff that he was the proprietor of the land free from all incumbrances, did accordingly purchase from the plaintiff the said five acres of land at and for the price or sum of £300, and then paid the plaintiff the sum of £75 on account of such purchase money, and thereupon the plaintiff executed a deed of bargain and sale, or caused to be conveyed to the defendant the said five acres hereinbefore described, containing the usual covenants for title, free from all incumbrances, and the defendant executed to the plaintiff the mortgage on the said five acres hereinbefore mentioned, and in the declaration declared on, to secure to the plaintiff the balance of the said purchase money, and not otherwise.

And the defendant further saith, that at the time of the said sale, and of the making of the said deed and mortgage, the plaintiff was not the owner of the said lands free from all incumbrances, but, on the contrary thereof, at the time of such sale to the defendant there existed upon the said land so sold to the defendant, and upon other lands adjoining thereto, formerly owned by the plaintiff, a mortgage to the Trust and Loan Company of Upper Canada, theretofore made by one George Whitehouse, the younger, for securing to the said company the payment of a large sum of money, which fact was not communicated to the defendant, but was concealed from him at the time of the said sale, otherwise he would not have purchased the said five acres, nor would he have executed the mortgage declared on. And the defendant



further saith, that neither the plaintiff, nor the said George Whitehouse, the younger, did pay to the said Trust and Loan Company the money secured by the said mortgage to them, or any part thereof, at the time when it became due, but therein wholly failed and made default, whereupon the said company, heretofore, and after the making by the defendant to the plaintiff of the mortgage declared on, and before the commencement of this suit, under and by virtue of a power of sale contained in the said mortgage to them, the Trust and Loan Company, in order to realize the money thereby secured, absolutely sold and conveyed to divers persons the lands therein described, and amongst others the said five acres of land so sold by the plaintiff to the defendant, and for securing the balance of the purchase money of which to the plaintiff the mortgage declared on was given, whereby the defendant not only lost and was deprived of the said five acres of land, and divers large improvements made and erected by him, but also divers large sums of money paid by him to the plaintiff on account of the purchase money thereof before the said sale by the said Trust and Loan Company.

And the defendant further saith, that the plaintiff is wholly insolvent, and the defendant therefore could not recover or realize from him his, the defendant's, damages sustained by reason of such encumbrances on and defect of title to the said five acres of land hereinbefore mentioned, and by means of which the defendant lost and was deprived of the land as aforesaid; and so the defendant saith that it would be unjust, and contrary to equity and good conscience, to allow the plaintiff to recover from the defendant the balance of the said mortgage money, being the money in the said declaration mentioned, or any part thereof; and this the defendant is ready to verify.

*Replication*, on equitable grounds, that the deed in the declaration mentioned, and the premises thereby conveyed, and the moneys thereby covenanted to be paid to the said plaintiff and his assigns, were by a certain indenture of bargain and sale by way of assignment, dated the 10th of September, 1856, and before the commencement of this action, and executed by the said plaintiff, conveyed, assigned,

and made over to John Charles Robinson, of, &c., and William Elliott, of, &c., absolutely, for a valuable consideration then paid by the said J. C. R. and W. E., to the said plaintiff, and that the said J. C. R. and W. E. had not, nor had either of them, any notice or knowledge of any of the alleged facts or circumstances in the said plea set forth as matters of defence on equitable grounds, before, or at the time of, or until long after such execution and payment; and at the date of such execution and payment the said plaintiff ceased to be, and the said J. C. R. and W. E., became, and they have ever since continued, and now are, under the said indenture of assignment, entitled to the said indenture of mortgage, lands and moneys; and that this action is brought for the sole benefit of the said J. C. R. and W. E., and not for the benefit of the said plaintiff.

And the plaintiff further says that the conveyance of the land to the defendant mentioned in the defendant's equitable plea, and in which he states the usual covenants for title were contained, was executed by one Joseph Hollis Whitehouse to the defendant, and not by the plaintiff, and that at the time of the execution thereof the defendant had notice of the prior mortgage to the Trust and Loan Company in the defendant's equitable plea mentioned; and the plaintiff further saith, that the alleged equities cannot prevail as a defence to this action against the said J. C. R. and W. E., as purchasers for valuable consideration without notice of the same.

And the said plaintiff also says, that after the execution of the said indenture of assignment to J. C. R. and W. E., and after the said defendant had notice thereof, and of the mortgage to the Trust and Loan Company in the said plea mentioned, and many months ago, two several actions at law were commenced against the said defendant on the said covenant for payment, in respect of former breaches of the same, to which actions the said defendant offered no legal or equitable defence at the trials thereof, and judgments were entered up for the plaintiffs in the same, and executions issued thereon; and also that after such notice of the said mortgage to the Trust and Loan Company the said defen-

dant went into possession of the said premises, and at all events continued in such possession, and removed buildings from the same, and executed acts of ownership thereon; and the said plaintiff says that the said defendant hath by his conduct and default aforesaid, and otherwise, confirmed and acquiesced in the transactions in the said plea set forth, and hath been guilty of laches and delay in the assertion of his alleged equities in the said plea set up, and hath abandoned the same, and that by reason of the premises he is not now entitled to insist thereon.

And the plaintiff further saith, that after the making of the deed by the said Joseph Hollis Whitehouse to the defendant as aforesaid, and which said deed the defendant erroneously alleges in his said plea was made by the plaintiff, the defendant executed an indenture of mortgage to secure to the plaintiff upon the said land the payment of the sum of £225, with interest, as in the said indenture of mortgage is set forth, and the defendant thereby covenanted with the plaintiff, his executors, administrators or assigns, that he, the defendant, at the time of the sealing and delivery of the said mortgage, had and stood rightfully seised of a sure, perfect, and indefeasible estate of inheritance in fee simple, of and in the lands thereinbefore described, with the appurtenances thereto belonging, and also that he had good right and full power to convey and dispose of the said lands, with the appurtenances, in the manner thereinbefore set forth; and the plaintiff saith that the money secured by the said mortgage is still unpaid, and that the covenant upon which this action is brought is contained in the said indenture of mortgage; and therefore the defendant has no remedy either at law or in equity.

The plaintiff also demurred to the plea, on the grounds that the same does not shew any ground upon which a court of equity would restrain the plaintiff unconditionally from proceeding with this action, or relieve the said defendant from his common law liability upon the covenant sought to be recovered on, it not being stated or shewn that any such fraud was practised on the said defendant in or about procuring the said mortgage to be executed by him as would avoid the



whole transaction in the said plea set forth, and the said defendant not claiming any such relief, but on the contrary insisting on the covenant against encumbrances in the said plea mentioned; and it not being shewn that the said defendant has any other ground of equitable relief in the premises, the only remedy of the said defendant in the premises being by way of cross action upon the said covenant against encumbrances in the said plea mentioned, and the alleged insolvency of the said plaintiff forming no ground for the interference of a court of equity.

The defendant demurred to the replication, assigning as grounds of demurrer, that the said replication admits the facts stated in the plea, and that such facts constitute a good defence as between the defendant and the plaintiff on the record, and nothing in the said replication contained could place the alleged assignees of the mortgagee in a better position than the plaintiff himself, because a covenant in a mortgage, such as that declared on, being a mere chose in action, is not assignable at law so as to give the assignee a right of action in his own name, and the assignee in equity takes only subject to all the equities and grounds of defence that may exist as between the original parties, even though the assignees may have had no notice of such equities and grounds of defence: that the said replication does not state that the said mortgage to the Trust and Loan Company was not registered, and if registered the said J. C. R. and W. E. must have had notice thereof, as registry is notice to all: that it is not shewn that the actions of law referred to in said replication were brought or tried after the sale by the Trust and Loan Company under their mortgage, and if not after such sale, then such actions could not have been successfully resisted, as the equitable defence did not fully arise until after such sale, and the defendant did not and could not know but that the plaintiff or his said assignees would have paid off the said Trust and Loan Company's mortgage, as they should have done, and have protected the defendant's land therefrom, and at all events neither the recovery of judgments in the said actions without defence, nor the alleged possession of the said land by the defendant, which

must have been before the enforcement of the said mortgage by the Trust and Loan Company, if at all, can affect the defendant's equitable defence in this action.

*Anderson and Blake* for the plaintiff, cited *Broom Leg. Max.* 691; *Lowndes v. Lane*, 2 Cox. Ch. Cas. 363; *Attwood v. Small*, 6 Cl. & Fin. 357, 523; *Sug. V. & P.* 13th Ed. 208, 211, 273, 274, 443; *Boyes v. McGregor*, 8 C. P. 244; *Dobell v. Stevens*, 3 B. & C. 623; *Small v. Attwood*, *Younge* 461, 462; *Pickering v. Dowson*, 4 Taunt. 779; *Smith Lea. Cas.* II., 61, 69; *Edwards v. McLeay*, *Coop.* 308, *S. C.* 2 *Swans.* 289; *Legge v. Croker*, 1 Ball & B. 506; *Gibson v. D'Este*, 2 Y. & C. 542, *S. C. Nom.* *Wilde and Wife v. Gibson*, 1 H. L. Cas. 605; *Sug. on Propy.* 596, 644, *Am. Ed.*; *Early v. Garrett*, 9 B. & C. 928; *Dart on V. & P.* 378; *Cator v. Earl of Pembroke*, 1 Br. C. C. 301; *Lord Portarlington v. Graham*, 5 Sim. 416; *Campbell v. Fleming*, 1 A. & E. 40; *Lovell v. Hicks*, 2 Y. & C. 46; *Montague v. Hill*, 4 Russ. 428.

*R. A. Harrison*, for defendant, cited *Anon*, 2 Ch. Cas. 19; *Sug. on Propy.* 442; *Nash v. Brown*, 6 C. B. 584; *Ord v. White*, 3 Beav. 357; *Hammond v. Messenger*, 9 Sim. 327; *Davis v. Hawke*, 4 U. C. Chy. Rep. 394; *Moffatt v. The Bank of Upper Canada*, 5 U. C. Chy. Rep. 394; *Earl of Macclesfield v. Fitton*, 1 Vern. 168; *Bradwell v. Catchpole*, 3 *Swans.* 78 note *a.*; *Williams v. Sorrell*, 4 Ves. 389; *Chambers v. Goldwin*, 9 Ves. 264; *Gooderham v. DeGrassi*, 2 U. C. Chy. Rep. 135.

ROBINSON, C. J.—This plea, it must be admitted, sets forth a very hard case, but one that would be more or less hard according to the care used by the defendant to protect himself in his transaction with the plaintiff.

It is not pretended that the facts stated in the plea form any legal bar to the plaintiff's recovering against the defendant upon his covenant; then do they constitute a sufficient equitable defence?

The defendant does not allege in the plea in positive and direct terms that the plaintiff made any representations to

him before or at the time of the sale upon the goodness of his title, but merely asserts that the plaintiff was or *professed to be* the owner, which does not amount to a statement that he made any profession about it to any body. But it would be idle to talk of verbal statements by the plaintiff, either direct or indirect, made before or at the time of the sale, when the plaintiff, as the plea states, made him a conveyance containing the usual covenants for title, if this defect or incumbrance were one which would be covered by such covenants as are stated. We cannot look out of the deed for any other assurances of title beyond those express covenants, nor can it be necessary for the purpose of obtaining any remedy or relief, either at law or in equity, though untrue statements fraudulently made by the plaintiff to the defendant of other matters relating to or connected with the property, might form a sufficient ground to the defendant for rescinding the purchase, and for relief against the payment of the purchase money.

In the next place, it is to be considered that the mortgage made to the Trust and Loan Company, according to the plea, was not an incumbrance created by the plaintiff, but by another person, and so not necessarily within the knowledge of the plaintiff more than of the defendant; and the plea does not aver that the plaintiff, when he sold to the defendant and took back from him the mortgage sued upon, had in fact any notice or knowledge of the mortgage to the Trust and Loan Company. I do not think that the averment in the plea that that mortgage was not communicated to the defendant, but was *concealed* from him at the time of the sale, can be taken as equivalent to an averment that the plaintiff knew of the former transaction, to which he was no party. The plaintiff could not be expected to communicate that fact unless he had knowledge of it, and though the defendant does say that the mortgage was concealed from him, he does not say that *the plaintiff concealed* it, and if he had I do not think that what may be thought to be implied or involved in the use of that expression "*concealed*," can be relied upon as dispensing with a direct averment that the plaintiff knew of the incumbrance. It is not stated in the



plea that the mortgage to the Trust and Loan Company was not on record in the proper county, and so open to the knowledge of every person searching, but I do not think that any thing could turn upon that.

These considerations are independent of the objections which are taken to the plea, as not being an admissible equitable plea within the meaning of the Common Law Procedure Act, though bearing, some of them, upon the question whether the facts pleaded would give a claim to relief in equity, by way of injunction against any proceeding to recover the unpaid purchase money. That is a question which could be more satisfactorily dealt with if we knew precisely what were the covenants in the deed given by the plaintiff to the defendant. All that is stated respecting them is that the deed "contained the *usual* covenants for title free from all incumbrances." I assume that to mean such covenants as are usual with conveyancers, and I assume also that in this country the covenants for title which a purchaser receives are not in general absolute and unrestricted, but are confined to acts done or suffered by the grantor, though I am aware that in early times in this province, when real estates were of less value, and attention had been little drawn to the distinction, and when conveyances were perhaps for the most part drawn by persons without professional knowledge, covenants for title were very frequently absolute and unrestricted. I will suppose that the defendant held from the plaintiff those covenants for title only which at the present day are usual among conveyancers in England and here: that is, covenants against any acts done or suffered by the plaintiff, and not those done or suffered by persons who owned the estate before him.

Looking, then, at the statements in the plea as not affected by any facts stated for the first time in the replication, the first question is, do they shew a case for resisting in equity the recovery of the unpaid purchase money upon the ground of *fraud*? I have already intimated that I think they do not, for in a case like this, where the conveyance has been executed, if there are no covenants in it which cover the defect or incumbrance, the purchaser, as a general rule, is

considered to have been content to take the risk of such defect or incumbrance upon himself; and if, on the other hand, the covenants are such as will afford a remedy in the particular case, then the vendee is left, as a general rule, to his remedy upon the covenants. Fraud in the vendor, it is true, creates an exception from the principle in either case, and where that is established the fact of the contract having been executed by delivery of the deed, will not deprive the vendee of his right to relief, and it will not be material in such a case whether the covenants do or do not extend to the particular defect or incumbrance. But then the fraud which will give a claim to equitable relief in such a case, must be the actual personal fraud of the vendor, his either misleading the purchaser by some statement false in fact, and known by him to be so, or his fraudulently concealing a defect or incumbrance of which he had knowledge, and which was unknown to the purchaser.

I do not think that fraud of this description is either sufficiently charged in the plea, or can properly be inferred from the facts set out, for if we could take the plaintiff's covenants for title to be absolute and unrestricted, which I do not think we can from the statement in the plea, it does not seem to be held that they come within the meaning of a "representation," with a view to make out a case of fraud; and, besides, if we should, as I think, intend them to be restricted covenants, then they could not be extended so as to include defects or incumbrances created before the plaintiff became seised.

Then the next question to be considered is, do the statements in the plea shew a good ground of relief in equity against being compelled to pay the purchase money, upon the other principle on which such equitable relief is frequently given; that is, to prevent the circuitry of action which would follow if the purchaser should be compelled to pay the price, and be left to recover it back by action on his covenants? This is a ground wholly independent of fraud.

The plea appears to me to fail in making out such a case, for the reason to which I have just referred, namely, that

the "*usual covenants for title*," which are all that the plaintiff is alleged in the plea to have given, would afford no remedy to the defendant on account of an eviction arising from an incumbrance created not by the plaintiff, but by George Whitehouse, a former owner of the property, and therefore there is no pretence for applying the principle of avoiding circuitry of action ; and the defect in the title is not one which could be set up as a reason for resisting the payment of the purchase money. In this view of the case the allegation in the plea of the plaintiff being insolvent cannot be material, nor would it, perhaps, at any rate be of consequence in the case, for if there were in the plaintiff's deed to the defendant covenants which would cover the defect in the title, the plea, it may be contended, does sufficiently set up an eviction to entitle the defendant to equitable relief against paying the purchase money, though it must be confessed that eviction of the defendant is not precisely averred. The plea only states that the defendant, by the sale under the power contained in Whitehouse's mortgage, lost and was deprived of the land, and of the improvements he had placed upon it, which may not have been intended to mean that he has actually lost the possession, but only that he has lost the title to the land ; and this of course would not be equivalent to eviction, and would not have the same effect in enabling the purchaser to resist payment of the purchase money where there have been proper covenants to meet the case, and where there has been no fraud.

Much more might be said upon the question of the sufficiency or insufficiency of this plea, for it opens many points for consideration ; but holding it to be insufficient for the reasons stated, I need not go into other grounds, such as the objection that the plea is not of such a nature as makes it properly admissible in a court of law under the Common Law Procedure Act, either from the incompetency of the court to deal finally and fully with the subject matter, or for any other reason ; and I think it unnecessary to consider the plea more particularly, for the further reason, that if the plea were in itself a sufficient defence, I am quite clear that the replication fully displaces the case which it sets up.



The defendant could certainly not contend successfully in a court of equity for an injunction against suing at law for the unpaid purchase money on account of a defect or incumbrance of which he had knowledge at the time he took his conveyance, and to which he took no exception, and even waived it subsequently, when it must have availed him if it should avail him now. And there are other grounds on which I think we must hold that the replication is a good answer to the plea, though one or more of them are perhaps such as might be rendered of no consequence by amendments which the court might be asked to allow to be made in the plea.

The averment in the replication, that the deed to the defendant, under which he holds, was in fact made to him *not by the plaintiff*, but by one Joseph Hollis Whitehouse, must be taken to be admitted by the demurrer, and it is a decisive answer to the defence set up by the plea so far as it rests upon any other ground than fraud, for it thus appears that the defendant could have no remedy against the plaintiff upon any covenant, and therefore there is no pretence for a court of equity interposing in order to prevent circuity of action.

And this statement in the plea, moreover, shews that there is no foundation for the argument in this case that the plaintiff's own covenant for title amounted to a representation that he was owner, for it seems there was no covenant or conveyance of any kind from the plaintiff to defendant, though it may well be that it was with the plaintiff that the defendant bargained for the estate, and that in effect he bought it from him, though the legal title may have been in Joseph Whitehouse. And there is, besides, this answer given to the plea, that the purchase money sued for in this action belongs in fact to Robinson and Elliott, as assignees of the mortgage, who purchased it for good consideration, without any notice of the prior mortgage, or of any defect in the title; and if a court of equity could not give relief to the defendant without throwing the loss upon innocent purchasers for value, I think they would decline to interfere, and would leave the defendant to his remedy under his deed from Joseph Whitehouse, if it contained covenants that

would indemnify him, or would leave him to bear the loss if he were so improvident as to take no covenants that would cover the defects, nor to make searches and enquiries that would probably have protected him against what has happened.

In my opinion the plaintiff is entitled to judgment on both demurrers.

BURNS, J.—The plea in this case is defective in not shewing what title George Whitehouse had which enabled him to mortgage the five acres in question to the Trust and Loan Company. It is true it is stated that under the mortgage so made by George Whitehouse the defendant has been deprived of the land, but whether it was because he, George Whitehouse, had a title paramount to that of the plaintiff, or whether it was such as the plaintiff could procure, or because the defendant made no resistance, does not in any way appear. Besides this objection, I think the objection that upon the facts stated in the plea an account would have to be directed is fatal to it. The plea shews that the land in question was included with other land in the mortgage to the Trust and Loan Company. Assuming that George Whitehouse had a right to mortgage the land to that company, that fact does not establish that the plaintiff had not an equitable right to sell to the defendant, and therefore, as we have the matter before us upon equitable considerations, we should have to hold that the defendant was not at liberty to rescind the whole contract, but that it was a subject matter of compensation between the parties. When the case comes to that, then it is quite clear we have no jurisdiction, for a common law court has not the machinery to take such accounts. The plea is framed upon the idea that the defendant has a right to rescind the whole contract. If that position could be maintained, then it would follow that he should have all the money he has already paid refunded to him. Now when we look at what is stated in the replication, if that be true the defendant's position, even supposing that my view of the plea be incorrect, is upon those facts untenable. Putting out of the question the fact of the de-

defendant's mortgage being assigned, and in fact held by other persons than the plaintiff, the replication asserts that the defendant had notice of the mortgage to the Trust and Loan Company when he executed the mortgage to the plaintiff. If that be true, it surely must put an end to any defence stated in the plea upon equitable grounds, for if he knew of the existence of that mortgage when he executed his own to the plaintiff he cannot complain, and he could not after that claim to rescind the contract.

I think judgment should be for the plaintiff.

McLEAN, J., concurred.

Judgment for plaintiff on demurrer.

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#### THE SAME CASE—ON AMENDED PLEADINGS. (a)

Defendant having been allowed to amend, pleaded that before making the mortgage sued on the plaintiff falsely and fraudulently represented himself to be the owner of the land, free from all incumbrances, but that the legal estate was vested in one W., who held in trust for him: that defendant relying upon this representation purchased the land, &c., although the plaintiff then well knew of the mortgage to the Trust and Loan Company, which he fraudulently concealed from defendant; and thereupon said W., at the plaintiff's request, conveyed to defendant by a deed containing absolute covenants for title free from incumbrances, and defendant executed the mortgage sued on to secure the balance of purchase money. The plea then alleged the existence of the mortgage to the Trust and Loan Company, which fact was well known to the plaintiff at the time of such sale and false representations, but was fraudulently concealed by him from defendant for the purpose of defrauding defendant, who otherwise would not have purchased: that the land was sold by the Trust and Loan Company, and defendant was evicted therefrom, and lost the same, &c.

The plaintiff replied the assignment of the mortgage before action, as in his previous replication, denied the false representations and fraudulent concealment alleged, and averred that the mortgage to the Trust and Loan Company had been duly registered before the execution of the conveyance to the plaintiff, and that the defendant had notice of the said mortgage when he executed that declared on; and the former actions brought on the covenant, and defendant's acts in taking possession of the land, &c., were alleged as before.

*Held*, on demurrer to the replication, that it was clearly a good answer to the plea.

*Semble*, that the plea shewed a good legal defence on the ground of fraud, but was not such an equitable plea as could be admitted under the Common Law Procedure Act.

The defendant, after the foregoing decision, was allowed to amend, and in the plea as amended it was alleged, after

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(a) This judgment was given in Michaelmas Term, but is reported here for convenience, being connected with the previous decision.



stating the mortgage as before—that before making the said mortgage by the defendant, the plaintiff falsely and fraudulently professed and represented himself to be the owner of the said land, with other lands adjoining thereto, free from all incumbrances, but that the legal estate was vested in one Joseph Hollis Whitehouse, who held simply in trust for the plaintiff; and as such owner the plaintiff proposed to the said defendant to purchase the said five acres of land therein before described; and the defendant, relying upon the statements and representations of the plaintiff, that he was the proprietor of the said land free from all incumbrances, did accordingly purchase from the plaintiff the said five acres of land for £300, and then paid the plaintiff the sum of £75 on account of such purchase money, although the plaintiff at the time of such purchase and false representations aforesaid, well knew of the mortgage and incumbrances hereinafter mentioned, which he fraudulently concealed from the defendant, and thereupon the said Joseph Hollis Whitehouse, at the request of the plaintiff, and for his benefit, executed a deed of bargain and sale, and the plaintiff caused to be conveyed, or professed so to do, to the defendant the said five acres by the said deed, containing full and absolute covenants for title, free from all incumbrances by all persons whomsoever done, committed, or suffered, and the defendant executed to the plaintiff the said mortgage, to secure to the plaintiff the balance of the said purchase money, and not otherwise.

That at the time of the said sale, and of the making of the said deed and mortgage, the plaintiff was not either the legal or equitable owner of the said lands free from all incumbrances, but, on the contrary thereof, at the time of such sale to the defendant there existed upon the said land so sold to the defendant, and upon other lands adjoining thereto, formerly owned by the plaintiff, a mortgage to the Trust and Loan Company of Upper Canada, theretofore made by one George Whitehouse, the younger, for securing to the said company the payment of a large sum of money, which fact was well known to the plaintiff at the time of such sale and false representations aforesaid, and was not

communicated to the defendant, but, on the contrary thereof, was fraudulently concealed from him by the plaintiff, for the purpose of defrauding the defendant at the time of the said sale, otherwise he, the defendant, would not have purchased the said five acres, nor would he have executed the mortgage declared on.

The plea then set out the sale by the Trust and Loan Company, as before, and alleged that thereby the defendant was evicted from and deprived of the said five acres of land and possession thereof, whereby, &c.; and it concluded, as the former plea, by an averment that the plaintiff and the said George H. Whitehouse were wholly insolvent, and that it would be inequitable therefore to compel defendant to pay.

The plaintiff replied to this amended plea, setting out, as in the previous replication, the assignment of the mortgage before action brought, and that neither of the assignees were aware of the facts pleaded. And the plaintiff further said that he did not falsely and fraudulently represent himself to be the owner of the said land, with other land adjoining thereto, free from all incumbrances, and did not falsely and fraudulently conceal the same from the defendant, as in the said plea alleged; but, on the contrary, that long previous to the making of the said deed by the said Joseph Hollis Whitehouse of the said five acres to the defendant, the mortgage to the Trust and Loan Company had been duly registered in the registrar's office of the county of Middlesex, where the said lands were situated, and the defendant had notice of the existence of the said mortgage to the Trust and Loan Company before and at the time when he executed the indenture of mortgage in which the covenant on which this action is brought is contained: that after the execution of the said indenture of assignment to the said J. C. R. and W. E., and after the said defendant had notice thereof, and of the said mortgage to the Trust and Loan Company in the said plea mentioned, and many months ago, two several actions at law were commenced against the said defendant on the said covenant for payment in respect of former breaches of the same, to the first of which actions the defendant pleaded on the record that the said indenture of

mortgage had been obtained by the plaintiff through fraud, nevertheless a verdict was rendered for the plaintiff for the amount then claimed; and to the second of which said actions the defendant offered no legal or equitable defence; and judgments were entered up for the plaintiff in the same, and executions issued thereon; and also, that after such notice of the said mortgage to the Trust and Loan Company, the said defendant went into possession of the said premises, &c., &c., (as before,) and that by reason of the premises he was not entitled to insist thereon, or to set up as a defence to this action the supposed false or fraudulent representation or concealment of the plaintiff in the said plea mentioned: that after the making of the deed by the said Joseph Hollis Whitehouse to the defendant as aforesaid, and when the defendant was fully aware of the existence of the said mortgage to the Trust and Loan Company, the defendant executed the said indenture of mortgage to secure to the plaintiff upon the said land the payment of the sum of £225, &c., &c., as in the former replication.

Defendant demurred to this replication:—1. Because the same is multifarious and uncertain. 2. Because the fact alleged in the said plea, that the said indenture of mortgage was placed on record, as in the said replication set forth, is no answer to so much of the defendant's plea as alleges that the plaintiff made the false and fraudulent representations in said plea alleged, or to any other portion of said plea which defendant relies upon for defence to this action. 3. That the said John Charles Robinson and William Elliot are, as appears from the said replication, the assignees of a chose in action, and as such subject both at law and in equity to all the equities between the original parties.

*R. A. Harrison* for the demurrer. *Blake, contra.*

In addition to the cases referred to on the former argument, page 71, *Hayne v. Maltby*, 3 T. R. 438; *Mangles v. Dixon*, 3 H. L. Cas. 702; *Stor. Equ. Jur.*, sec. 401; *Cockell v. Taylor*, 15 Beav. 103, were cited for the demurrer.



ROBINSON, C. J., delivered the judgment of the court.

We think this replication is a sufficient legal answer to the plea; and that appears to us so plain on several grounds, that we do not think it necessary to consider at any length whether this plea, which we take to be well answered, is in itself a good equitable plea under the statute. If it could only be upheld on that footing, my present opinion is that it would fail, for I take it not to be such an equitable plea as the defendant is at liberty to plead; but we take it to be a good legal defence on the ground of fraud, and such as would have entitled the defendant to judgment in his favour if it had been demurred to, instead of being met by what we take to be a good replication.

The plaintiff, it will be seen, expressly traverses in the replication the fraudulent representation imputed to him, and he avers moreover that the defendant knew of the incumbrance before he took the title, and with this knowledge entered into possession, and being sued in two actions pleaded fraud in one, but failed to prove it, and in the other set up no such defence. And all this is independent of the circumstance that the real plaintiffs in this suit are the assignees of the mortgage, who had no knowledge of the fraud.

Judgment for plaintiff on demurrer.

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### LAMBE V. TEETER.

*Declaration—Whether trespass to land or goods charged.*

*Declaration*, that the plaintiff being the mortgagee and owner, and one F. being the occupant by plaintiff's permission, under an overdue mortgage between them, of a certain saw factory worked by a certain other steam engine thereon, all situate upon and forming part of a certain close, buildings, erections, and appurtenances, known as, &c., (describing the land,) the defendant, under a false claim of purchase of such steam engine, wrongfully broke, and caused to be broken, such saw factory for the purpose of taking, and did thereupon wrongfully take, and cause to be taken therefrom such steam engine, and also thereupon wrongfully took such steam engine, and caused the same to be wrongfully taken away and converted to his own use. Defendant pleaded, 1. That the goods and chattels mentioned were not the plaintiff's. 2. That the close was not his.

*Held*, on demurrer, that the declaration charged a substantive trespass both to the land and goods, and that the pleas therefore were bad, as professing each to answer the whole cause of action, and being a defence only to part.

DECLARATION that the plaintiff, being the mortgagee and

owner, and one Joseph Flint being the mortgagor and occupant by sufferance or permission of the plaintiff, under and by virtue of an overdue, unpaid, and unsatisfied indenture of mortgage between them, dated the 1st of January, 1856, of a certain saw factory, worked by a certain other steam engine thereon, all situate upon and forming portion of a certain close, buildings, erections, and appurtenances, known as lots numbers, &c., (describing the land,) the defendant, under a false claim of purchase of such last mentioned steam engine from certain assignees of said Flint, who had no right or power to sell the same, wrongfully broke, and caused to be broken, such saw factory, for the purpose of taking, and did thereupon wrongfully take, and cause to be taken therefrom, such steam engine, and also thereupon wrongfully took such steam engine, and caused the same to be wrongfully taken away, and converted to his, the defendant's own use; and the plaintiff claims £500.

*Pleas.*—4. That the said goods and chattels in the said count were not, nor were any or either of them the plaintiff's, as alleged in the said second count.

5. That the said close in the said second count mentioned was not the plaintiff's as alleged.

The plaintiff replied to these pleas, and defendant demurred to the replication, which it is unnecessary to set out, as the judgment is not given upon it. The plaintiff joined in demurrer, and gave notice of the following exceptions to the pleas:—that there are not any goods or chattels mentioned in the declaration, and if there were, the fact of the property in them being out of the plaintiff, would not justify the defendant in injuring wrongfully the plaintiff's reversion in the realty in the manner therein alleged. And also, whether the property in the close mentioned was in the plaintiff or not, so long as he owned the saw factory thereon, and the steam engine which drove it, in the manner specified, which the defendant by implication admits, a good cause of action exists against the defendant for the grievances by him committed, as in the declaration alleged, concerning such steam engine and saw factory.

*Spohn*, for the demurrer, cited Chy. on Plg. I. 674.

*R. Martin*, contra.

ROBINSON, C. J., delivered the judgment of the court.

After some hesitation, from the uncertain nature of the declaration, we think the pleas are both bad. The declaration we think alleges a trespass to the close, and also a substantive trespass to the goods; and these pleas profess, each of them, to be pleaded in bar of the whole declaration, while each in fact applies only to one of the causes of action which we think may be held to be embraced in it.

Judgment for plaintiff on demurrer.

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FRANKLIN v. GREAM, LESTER, AND PONTON.

*Action against sureties of division court clerk—Set-off.*

An action against the sureties of a division court clerk for moneys received by him for the plaintiff, having been referred to arbitration, the arbitrator submitted a special case, stating that in 1858 the plaintiff sued the clerk for goods sold to him: that the clerk then produced a memorandum of settlement between them, signed by the plaintiff, relating to suits in the division court, which shewed a sum of £30 0s. 8d. due to the clerk: that the judge thereupon, against the clerk's wish, and without any particulars of set-off having been given, treated this as a set-off and deducted it from the plaintiff's claim. The sureties, defendants in this suit referred, contended that the plaintiff's demand then sued for being a private account against the clerk, that sum was improperly set off, and they claimed to have it credited to them in this action against moneys since received for the plaintiff.

*Held*, that what had been done in the former suit could not be thus reviewed, and that, as the clerk could not take credit a second time for this sum as against the plaintiff, neither could his sureties.

The defendant Gream, a division court clerk, and the other two defendants, his sureties, were sued upon their covenant given according to the statute for moneys received by Gream, as such clerk, for the plaintiffs.

The suit was referred in the ordinary form to Huson Gilbert Northrup, Esq., who stated the following case for the opinion of the court:

"I do award and find that there was at the time of the issuing of the writ in this suit, and still is due and owing to the plaintiff the sum of £20 19s. 4½d., and I do further find that heretofore, to wit, sometime in the summer of 1858,



before the commencement of this suit, at Sterling, in the county of Hastings, the now plaintiff sued the said Gream in the fifth division court of the county of Hastings, for goods sold and delivered by the now plaintiff to the said Gream, and that the account on which said suit was brought was for a greater amount than the jurisdiction of the division court, and in order to bring it in said court the plaintiff abandoned about £9 of his claim, thereby reducing his claim within the said jurisdiction: that the defendant Gream, for the purpose of showing the judge that the action should not have been brought in said division court, but in one of the superior courts, produced a memorandum of a settlement between him and the plaintiff, signed by the plaintiff, for suits in the division court of which the said Gream was clerk, and after giving the plaintiff credit for all moneys he had received, and charging him, the said plaintiff, with all costs then due, and retaining in his hands certain sums as a deposit for the costs on unsettled suits, there was a balance of £30 0s. 8½d. due to the said Gream as clerk upon settlement of division court moneys and costs, without taking into account the account of the plaintiff against said Gream for goods sold: that the judge at said division court, against the wish of the said defendant Gream, upon the said memorandum of settlement being produced, and without any other particulars of set-off being given, treated it as a set-off, and deducted the amount from the amount of the plaintiff's whole account, and gave judgment for the now plaintiff for the balance due him for goods sold.

“The defendants claim that the said £30 0s. 8½d., could not be set off against a private account against Gream for goods sold and delivered, as the matters did not accrue in the same right, and that the said £30 0s. 8½d. should be credited to them against moneys received belonging to the plaintiff by Gream's clerk since the said settlement.

“If this Honorable Court shall decide that the defendants are not entitled to this credit of £30 0s. 8½d. in this action, then I do award that the said sum of £20 19s. 4½d. above named, be increased by the said sum of £30 0s. 8½d., and together making the sum of £51 0s. 1d., be the amount of my award hereby awarded to the plaintiff; and I do award and direct the same to be paid to the plaintiff by the defendants.

“If the said court should adjudge that the said sum of £30 0s. 8½d. should be allowed to the defendants, then I award that there was due to the plaintiff the sum of £20 19s. 4½d. at the time of the commencement of the said suit; and

I do award and direct the same to be paid by the defendants to the plaintiff, &c."

*English* for the plaintiff.

*Morphy*, contra, cited *Bristowe v. Needham*, 8 Scott N. R. 366 ; *Doe v. Darnton*, 3 East 149.

ROBINSON, C. J., delivered the judgment of the court.

The propriety of what was done in the suit between Franklin and Gream, by the court, cannot be reviewed, and the judgment in that case in effect reversed, by the arbitrator in this case. Gream having once had credit for the £30 0s. 8d. with Franklin, whether by his own desire or not, the effect is the same as if Franklin had paid him that sum in cash, which, if he had paid it, Gream might have spent afterwards in buying goods from him, instead of having spent the amount before.

It is out of the question that Gream should be allowed to take credit for the £30 0s. 8d. a second time in his settlement with Franklin, and if he could not, neither can his sureties.

We think the amount should be added to the award.

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## JOHN WASHINGTON WALLACE V. HEWITT.

*Ejectment—Forfeited estates—54 Geo. III., ch. 9; 59 Geo. III., ch. 12—Construction of—Right of alien to devise.*

The 54 Geo. III., ch. 9, enacts that all persons seised of land in this province, who had withdrawn into the United States since the 1st of July, 1812, without license, or shall do so during the war, shall be considered aliens born, and incapable of holding land within the province. The Governor, &c., is to authorise persons in the several districts of the province to enquire and return by inquisition to the Court of King's Bench the names of such persons seised of land in the respective districts, and after such finding it is enacted that the lands found to have been theirs shall vest in His Majesty: Provided, that nothing therein shall prevent persons interested from traversing the inquisition, within one year after the finding, or after peace should be established.

By 59 Geo. III., ch. 12, estates thus found are vested in Commissioners: provision is made for publishing the lands returned, and for settlement of all claims thereto: the Commissioners are directed to sell them; and it is enacted that all land on which no claim shall be made pursuant to the act, shall be taken against all persons, and to all intents and purposes, to be vested in the Commissioners.

The plaintiff claimed the land in question as devisee of one W., his father, who received a patent for it in 1798, and died in 1823, in the United States, having left Niagara, where he had been living, in 1813. The defendant claimed through a conveyance from the Commissioners, and put in a commission issued in 1815, under the 54 Geo. III., ch. 9, appointing certain persons named as Commissioners for the Niagara District, and giving them power to enquire whether said W. had gone over to the enemy during the war, and if so then what lands he was seised of. He proved also an inquisition in pursuance of this commission, finding that W. had gone over, and was seised of certain land specified in the Town of Niagara, and of the land in question, which was in the Home District. The Commissioners conveyed in 1821 to one C., and the defendant claiming under him went into possession in 1822, the land being then in a state of nature, and had held ever since. The plaintiff had not been in this province for twenty years before the action.

*Held.*—1. That by the 59 Geo. III., ch. 12, the plaintiff was clearly precluded from contesting the Commissioners' title, and that he therefore could not recover.

2. That the fact of W. being an alien was well found, and extended in its effect to all vacant land of which he was seised, though not within the district to which the commission issued.

Whether as an alien the devise made by him was void, was discussed but not decided, but; *Held*, that as the statute declared him to be an alien, and incapable of holding lands within the province, he was by it disabled from devising.

EJECTMENT for lot No. 6, in the broken concession on the east side of the Grand River, or Ouse, in the township of Woolwich, described by metes and bounds.

The plaintiff claimed as devisee under the last will and testament of William Wallace deceased, the grantee of the Crown, and by conveyance or quit claim from other devisees in the said will.

The defendant claimed by deed under the Commissioners of Forfeited Estates appointed under 59 Geo. III., ch. 12.



At the trial, at Stratford, before *McLean*, J., the following evidence was given :—

For the plaintiff a patent was put in, dated the 5th of February, 1798, to William Wallace, for block No. 3, on the Grand River, containing 86,078 acres. The consideration was stated to be £16,364, secured to be paid to The Hon. D. W. Smith, Captain Wm. Claus, and Alex. Stuart, Esq., in trust for the Chiefs, Warriors, and People of the Mohawk or Five Nations, as an equivalent for so much of the said lands surrendered and relinquished by them.

In opening the case, *C. S. Patterson*, for the plaintiff, stated that the above block contained the present township of Woolwich and Pilkington : that the latter township, containing 30,000 acres, had been conveyed by William Wallace to the late Colonel Pilkington, and that portions of what now forms the township of Woolwich, had also been conveyed to various parties.

*William Spragge*, Superintendent of Land Sales in the Crown Lands Department, produces two original maps from the office, shewing the block No. 3 on the Grand River as described for patent. The maps were drawn by Mr. Chewett, acting Surveyor-General at the time : the description in the patent corresponds with the map. Block No. 3 afterwards became the township of Woolwich, and part of that township was subsequently formed into a separate township, as the township of Pilkington.

On the margin of the official copy of the description for patent, the word "impounded" is written, and on searching for the authority under which such entry was made, it was found that an order of council was made on the 24th of June, 1803, directing the patent to be impounded. (Copy of order duly certified was produced.)

*Rev. Jas. H. Cumming*—Lives at Grand Rapids, Michigan. In 1821, and from that time up to 1829 or '30, resided in Rochester, State of New York : became acquainted with a person of the name of Wm. Wallace about 1821, then residing in Rochester, with his family. He died in 1823, at Rochester. He followed the business of a carpenter. Witness knew his family, thinks there were seven children, and that one had died before he became acquainted

with them. The family were at Rochester when witness left in 1829 or '30. They were parishioners of witness. Their names were John, (the present plaintiff,) Charity, Matthew, Hannah, Ann, James, and William. They are not mentioned in the order of their birth. Thinks Charity was the eldest of the family, and that Matthew was the eldest son. He was looked upon as the head of the family after his father's death. The family, as witness understood, removed to Brooklyn, and witness saw John and Matthew in the city of New York afterwards. Witness was living in New York from 1830, to '34 or '35, and John and Matthew Wallace were then living at Brooklyn. In 1838 witness saw John at Ypsilanti, in Michigan, where he then resided, but he removed from thence, after being there about two years, to the city of New York. Witness thinks William Wallace came to Rochester from a neighboring town, Lima. He told witness he had resided at one time in Canada. Witness occasionally visited and was acquainted with the several members of the Wallace family when living at Brooklyn.

*Wm. McLaughlin*—Resides in Rochester. Went first to live there in 1827, from West Bloomfield. Witness knew William Wallace. Thinks he first saw him in Rochester in 1814, in the fall, after the evacuation of Niagara by the American troops. In 1815, witness saw him in Lima, working at a meeting-house there, with his brother James. Witness understood he died in 1823, but witness at that time was residing in West Bloomfield. When witness had occasion to go to Rochester, he used to go to Wallace's house. Witness first knew him in 1796 in the Town of Niagara. Lived with him from 1796 till 1810 in Niagara. He was married, but had no children when witness first went to live with him. His first child was a daughter, called Charity; Matthew was the next and the eldest son; Hannah, William, James, Ann, and John. John was the youngest when witness left, as he thinks. A child was born, as witness understood, after witness left. Witness was at Wallace's house in Niagara in June 1813, while the American army had possession of Niagara. Witness knew a man of the

name of Lockwood, a tinsmith, and one Phineas Howell, at Niagara, while witness was residing there. Witness was familiar with the hand-writing of William Wallace at one time. The signature to the will produced looks like his writing; but witness has not seen him write since 1810, and cannot speak positively respecting it.

*Cross-examined.*—Witness was five years of age in 1796, when he went to live with Wallace at Niagara; born in 1791. Witness only knew one person of the name in Niagara. He claimed to own land on the Grand River; understood he bought it from Captain Brant. Phineas Howell died at Buffalo, as witness thinks, in 1815.

*John Cox.*—Was born near Niagara, in 1791, and has lived there ever since. Knew John Lockwood and Phineas Howell, (whose names appear as witnesses to the will of William Wallace,) but did not know Thomas Hubbard, whose name is also subscribed. Witness knew William Wallace. He carried on a large brewery for a number of years. He was a carpenter by trade, and leased some ground from Government, and built a brewery on it, about the year 1804. He carried on the brewing up to the commencement of the war in 1812. John Lockwood is dead. He was shot, as witness understood, by accident, by his wife, while the American army were at Niagara. Witness does not know whether Phineas Howell is dead or not. No such person is now at Niagara.

*Cross-examined.*—Witness was at Niagara when it was taken by the American army on the 27th of May, 1813. The troops and militia retreated, and an order was issued by General Vincent for the issue of rations to such of the militia as chose to follow the army, but permitting them to return to their homes if they thought proper. Witness and a number of others returned to their families near Niagara during the night of the 28th of May, and the following day they were taken prisoners about sunrise, and were taken to what was called the Government House, where they were placed on parole. Each of them received a writing, stating the terms of the parole, and after that they were allowed to go at large. Witness knew Wallace very well at Niagara.



He was not amongst the number of those placed on parole at the same time with witness. After the defeat of the American army at Stony Creek, a troop of dragoons were sent out into the settlement and made prisoners of all they could catch, and brought them into the town. Some of them were sent across the river. Witness made his escape, and afterwards took up arms against the enemy. Witness was a gunner in Captain John Powell's company of artillery at the time of the taking of Niagara.

Will of *William Wallace*, bearing date at Niagara, on the 24th of August, 1813, was put in, devising his property to the several members of his family.

*William Wallace*.—Son of Matthew. Witness' father is now living at Brooklyn, New York. The signature of Matthew Thornton Wallace to the deed produced is in his handwriting. The witness proved the death of some, and the signatures of several others of the sons and daughters of William Wallace.

The execution of this deed, under which the plaintiff claimed, dated the 15th of October, 1858, was admitted. It was a quit claim of all the interest of the grantors in the premises, in consideration of one dollar paid to each, and was also put in and admitted.

*Eccles*, Q. C., objected, on the closing of the plaintiff's case, that it was not shewn that the plaintiff, or any one under whom he claimed, had been in possession of the premises since 1814; that if in possession, then such possession was abandoned, and had not been resumed, and that upwards of forty years having since run, the right of the plaintiff was barred under the statute; and that under section 17 of 4 Wm. IV., ch. 1, the possession being abandoned for upwards of twenty years, the plaintiff could not recover.

Evidence was then given for the defence, as follows:—

*William J. Small*—Clerk in the Crown Office, Toronto, received the original record produced from the Clerk of the Crown, to be produced on this trial.

In the list of persons appearing on the record as an alien, is the name of William Wallace, brewer, of the town of

Niagara, District of Niagara, and under the head of "Real Estate vested in His Majesty, under the Provisions of the Provincial Act of 54th Geo. III., are the following parcels of land and premises, lots Nos. 9, 10, 11, and 12, in the town of Niagara, containing two acres, and also a certain parcel or tract of land in the Home District, containing by admeasurement seven thousand acres, being part or parcel of block No. 3 of the Indian Land on the Grand River, being a triangular block lying on the east side of the said river, opposite the forks thereof in block No. 3. Date of inquisition, the 27th of May, 1816. Commissioner, Abraham Nelles, Esq. Date of return, the 2nd of January, 1817.

An exemplification, under the seal of the Court of Queen's Bench, was put in, of the inquisition above mentioned, taken before A. Nelles, Esq., finding that William Wallace, formerly an inhabitant of the United States of America, claiming to be a subject of our lord the King, and renewing his allegiance as such by oath, did since the 1st of July, 1812, and before the conclusion of the war, voluntarily withdraw himself from the Province of Upper Canada into the United States, without license, and they found that he was seised in his demesne as of fee of and in the premises, as described in the record of forfeited estates.

A deed was put in, dated the 6th of November, 1821, from the Commissioners of Forfeited Estates to William Crooks, for the consideration of £1,225, reciting the statutes, and the inquisition finding William Wallace in possession of the premises contained in the deed, containing 7048 acres, and described by metes and bounds. Execution admitted.

It was admitted that the defendant had a title derived from the Commissioners of Forfeited Estates, and that he entered into possession of the land in question in September, 1822, and had held and improved it since that period, the land having been in a state of nature at that time.

*Adam Wilson*, Q. C., for the plaintiff, objected that by the commission exemplified, it appeared that Joseph Edwards, Abraham Nelles, and William Crooks, were appointed as Commissioners for the District of Niagara, to hold inquisi-

tions as to persons who had gone during the war into the United States from that district, and the lands which such persons were seised of within that district, but that such commission did not give to such commissioners, or any of them, authority to return any lands held by any such persons in the Home or any other District: that the authority of the commissioners related wholly to persons who had left the Niagara District during the war, and the lands of which they were seised in that district: that the lands in question being in the Home District, an inquisition held in the Niagara District could not affect them: that the inquisition found that William Wallace was seised of 7,048 acres of land on the east side of the Grand River, and part of that tract laid on the west side, and could not be included in the inquisition.

*Galt*, Q. C., in reply, contended that under the Act 54 Geo. III., ch. 9, William Wallace, being found to be an alien, was incapable of holding lands, and that the plaintiff and his brothers and sisters could not take by inheritance from an alien: that the will of a person declared by law incapable of holding lands, could not transmit lands which the testator was incapable of holding.

A verdict was entered by consent for defendant, with leave to the plaintiff to move to enter a verdict for him on the grounds taken at the trial.

*C. S. Patterson* obtained a rule on the defendant to shew cause why the verdict entered in his favour should not be set aside, and a verdict entered for the plaintiff, on leave reserved at the trial, on the grounds that the plaintiff proved title in himself under his father, the patentee of the Crown, and that no act or proceeding shewn at the trial, was sufficient in law to divest the patentee or the plaintiff of such title.

*Galt*, Q. C., and *M. C. Cameron*, shewed cause. They cited *Doe Baker v. Clark*, 7 U. C. R. 48; *McDonald et al. v. Bank of Upper Canada*, *Ib.* 784; *Jarm. on Wills*, I. 34; *Shep. Touch.* 404; *Fourdrin v. Gowdey*, 3 Myl. & K. 383;



Page's Case, 5 Rep. 52; *Nichols v. Nichols*, Plow. 486; Co. Lit. 2, 129 *b.*; *Doe dem. Chandler v. Tesseir*, 6 U. C. R. 216; Chy. on Prerog. 333; *Attorney General v. Smith*, 2 Price 113; *Forsyth v. Hall*, Dra. Rep. 326; *Doe dem. Patterson v. Davis*, 5 O. S. 499.

*Adam Wilson*, Q. C., and *C. S. Patterson*, contra, cited *Attorney General v. Duplessis*, Parker's Rep. 144, 161; S. C. 1 Br. Parl. Cas. 415, 2 Ves. 286; 4 Leon. 84; *Barrow v. Wadkin*, 3 Jur. N. S. 679, S. C. 24 Beav. 1, 327; *Doe Griffith v. Pritchard*, 5 B. & Ad. 765; *Dwarris on Stats.* 564; *Chitty on Prerog.* 247; *Parslow v. Corn*, Cro. Eliz. 355; *Arden v. Blackhouse*, Moore 640; *Knight ex parte Duplessis*, 2 Ves. 555; *Paris Stoughter's Case*, 8 Co. 168; *Lord Sheffield v. Ratcliffe*, Hob. 334; Bac. Abr. "Alien" C.; 9 Geo. IV., ch. ch. 1; 10 Geo. IV., ch. 10; 11 & 12 Wm. III., ch. 6; 7 Wm. IV., ch. 7; *Davendort v. Davenport*, 7 C. P. 401; *Powell on Devises* 279; Bac. Abr. "Will" B.; *Chitty's Stats.* 2nd Ed., Vol. III., 1553.

The other statutes cited are referred to in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff in this, as in other cases of ejectment, was under the necessity of shewing a good title in himself, and especially when he came to dispossess the defendant of property of which the defendant had entered into possession in the year 1822, as a purchaser for value from commissioners appointed by the Crown under an act of parliament, and had been ever since living upon, and improving the land.

The defendant makes title as devisee, with others, of his father, William Wallace, deceased, and as assignee of his co-devisees, who have conveyed their interest to him.

The plaintiff objects to his title thus attempted to be made out on the grounds that the plaintiff's father, William Wallace, through whom he claims by devise, was incapable of devising the estate in question, for that he must upon the facts proved be held to have been an alien born, and incapable of holding lands within the Province of Upper Canada.

The statute, 54 Geo. III., ch. 9, passed by the legislature

of Upper Canada, during the war with Great Britain and the United States of America, recites that "many persons, inhabitants of the United States of America, claiming to be subjects of His Majesty, and renewing their allegiance as such by oath, did solicit and receive grants of land from His Majesty, or became seised of lands by inheritance or otherwise within this province, which persons, since the declaration of war by the said United States of America against His Majesty, and his subjects of the United Kingdom of Great Britain and Ireland, have voluntarily withdrawn themselves from their said allegiance, and the defence of the said province." And it enacts, "that all such persons as aforesaid, who having received grants of land, or may have become seised of lands within this province, by inheritance or otherwise, as shall have voluntarily withdrawn themselves from this province into the United States of America, since the first day of July, 1812," (the war having been declared on the 18th of June in that year,) "or who may hereafter during the present war voluntarily withdraw themselves from this province into the said United States, without license granted under the authority of the Governor, Lieutenant-Governor, or person administering the government of this province, *shall be taken and considered to be aliens born, and incapable of holding lands within this province.*"

The act then provides, (sec. 2,) that it shall and may be lawful for the Governor, Lieutenant-Governor, or person administering the government by commission under the great seal of this province, to authorise any sheriff, coroner, or other person or persons, in the several districts of this province, to enquire by the oaths of twelve good and lawful men of their respective districts, and by inquisition indented under the hands and seals of the said jurors, and of the said commissioner or commissioners, to return to His Majesty's Court of King's Bench all such persons as aforesaid, who seised of land in the respective districts, shall have voluntarily withdrawn from the province into the United States of America since the said first day of July, and before the conclusion of the existing war with those states, without license

granted under the authority of the Governor, Lieutenant-Governor, or person administering the government; and from and after the said finding by such inquisition, His Majesty shall become seised of the lands so found to have been in the seisin of such person on the said first day of July. *Provided always*, that nothing in this act contained shall be construed to prevent any persons interested in the said lands from traversing any inquisition or office respecting the same, at any time within one year after the peace shall be established between His Majesty and the United States of America, or within one year after the finding of such inquisition."

Sec 3.—"*Provided always*, that nothing in this act shall extend, or be construed to extend, to affect the claim of any *bonâ fide* creditor, or to defeat any just lien or security of, or upon any lands, tenements, or hereditaments whatsoever."

It was shewn by proper evidence upon the trial of this cause, that upon a commission issued under the great seal of the province, under this statute, to Abraham Nelles, Esq., and other commissioners for the district of Niagara, an inquisition was held on the 27th of May, 1816, within that district, and returned to the Court of King's Bench, on the 2nd of January, 1817, by which it was found that "William Wallace, formerly an inhabitant of the United States of America, claiming to be a subject of our lord the King, and renewing his allegiance as such by oath, did since the 1st of July, 1812, and before the conclusion of the war, voluntarily withdraw himself from the Province of Upper Canada into the United States of America, without license of the Governor," &c., "and that he was seised in his demesne as of fee of and in lots numbered 9, 10, 11, and 12, in the town of Niagara, containing two acres of land, *and also of* a certain parcel or tract of land in the Home District, containing by admeasurement 7000 acres, being part or parcel of block number 3 of the Indian land on the Grand River, being a triangular block on the east side of the said river, opposite the forks thereof, in block number 3."

There was also produced and proved the original book, made up as required by the statute of Upper Canada, 59



Geo. III., ch. 12, sec. 2, in which were entered and recorded by the Commissioners of Forfeited Estates appointed under that statute, the extracts furnished to them by the Clerk of the Crown and Pleas of all the inquisitions returned into the Court of King's Bench under the statute 54 Geo. III., ch. 9, whereby any real estate had become vested in His Majesty.

In this book there is entered among those who had by such inquisitions been found aliens, the name of William Wallace, brewer, of the town of Niagara, in the district of Niagara; and in the column headed "Real estate vested in His Majesty under the provisions of the Provincial Act, 54 Geo. III., ch. 9," are entered the parcels of land in the town of Niagara, and in the Home District, which are described and returned in the inquisition as lands of which the said William Wallace had been seised.

The Commissioners of Forfeited Estates, it was proved, sold this tract of land in the Home District, about 7000 acres, by public auction to William Crooks, Esq., for £1225, and conveyed it to him by their deed dated 6th November, 1821, according to the statute 59 Geo. III., ch. 12, in which deed the statutes and the inquisition are recited.

The defendant, it was admitted upon the trial, holds under a title derived from Mr. Crooks, the vendee of the commissioners, under which deed he entered in 1822, and has been always since in actual possession.

It is contended by the defendant that this evidence given on his part prevents the plaintiff from recovering as devisee, or as assignee of other devisees of the late William Wallace, under the will, which it was proved, on the plaintiff's part, was made by Wallace, and which bears date at Niagara, 24th August, 1813, for that William Wallace being found under the statute, 54 Geo. III., ch. 9, to have been an alien born, his will, admitting it to have been made at the time it bears date, could not have the effect of passing his real estate to his devisees at his death, which occurred in or about the year 1823, at Rochester, in the United States of America.

Whether the will was capable of operating or not at Wallace's death does not at all depend on the other question that

has been raised in the case, namely, whether the inquisition held in the district of Niagara could have the effect of vesting in the Crown the 7000 acres in the Home District, of which the land in question in this action forms a part, for the plaintiff must shew himself entitled to recover, before it can be necessary to determine upon the sufficiency of the defendant's title.

Upon that point, whether an alien can devise real estate, the authorities are not perfectly consistent. That grants by aliens are good as against themselves, though voidable by the Crown, is every where clearly stated; and that a person may make title under a grant from an alien, against any stranger, as well as against the alien himself, or any one holding or claiming title under him, seems, we think, to be conceded, except perhaps where the alien has died intestate, in which case it has been constantly held that the estate becomes at once vested in the Crown, without any office found, because no one can *inherit* from the alien.

Whether a person to whom an alien has taken upon himself to devise real estate, is in as good a position as the grantee of an alien—in other words, whether he can hold against all but the Crown—is a point on which many of those text books are silent to which we most naturally refer for information, and on which those who do treat of it speak uncertainly, and are not consistent in their conclusions.

In Sheppard's Touchstone, p. 404, it is said, "An alien born cannot make a testament of lands," for which Mr. Preston, in his edition of the Touchstone, gives the reason, "for the title will at his death be in the King." The Touchstone proceeds to lay it down that neither can the alien make a testament of his goods, which the learned editor corrects, referring to Comyn's Digest, "Alien," ch. 7, for the doctrine that an alien may dispose of his goods; and he adds "It is not the fact of an alien's birth, but the want of title, which deprives the will of effect, even as to lands." This seems fully to concede that the will of an alien devising real estate can have no effect, and for a very good reason, founded, as it would seem, in common sense, as well as on the express language of the Statutes of Wills, 32 H. VIII., ch.

1, and 34 & 35 H. VIII., ch. 5, secs. 4 and 15, which gives the power only to those only having any manors, lands, or estates of inheritance, to devise such estates, which cannot be with truth said of any alien.

Mr. Roberts, in his treatise upon Wills, vol. i., p. 35, tells us that an alien friend may bequeath *personal* estate, but that his alienage incapacitates him for holding land, "*and consequently for devising it.*" This is laid down in the second edition of his work, after he had had an opportunity of correcting any error that had been noticed by himself or the profession in the first edition, and so in a treatise on wills by Lovelass, which seems to have been in some credit with the profession, as it passed through at least nine editions, we are informed, that "aliens, as they are not capable of holding lands, can consequently never have any to dispose of, yet they may acquire property in goods, and may dispose thereof by will, provided they are alien friends."

In a work more modern, and of much better authority, the treatise on executors by the present Mr. Justice Williams, 5th Ed., vol. i., p. 11, the law is thus stated:—"Alien friends (or such whose countries are at peace with ours) may make wills to dispose of their personal estate, although being incapable of holding real property, they are of course equally so of devising it."

On the other hand, Mr. Jarman, in his treatise upon wills, 2nd Ed., vol. i., p. 32, states, "That a devise of lands by an alien is at least voidable; the Crown being entitled after office found to seize them in the hands of the devisee, as it might have done in those of the alien during his life. Until office the lands of an alien remain in him, with all the incidental qualities belonging to such estates; on which ground it has been held that an alien tenant in tail in possession might suffer a common recovery, and he may, of course, now execute its substitute, an enrolled conveyance, and thereby bar the issue in tail, and remainders; and by parity of reasoning, the will of an alien will vest his defeasible title in the devisee, though it is clear that if he die intestate the land will escheat to the Crown, or other lord, *pro defectu tenentis*, without any inquest of office, because an alien can have no heirs."



Any one who compares this passage with the notice taken of the same subject in other works on real property, will admit that the author has at least considered the point very carefully, with due attention to whatever can be found upon it; but he evidently rather intimates his opinion than states it with confidence; and when he refers, as he does in two places, to Sheppard's Touchstone, p. 404, it is evidently not for confirmation of the doctrine which he was himself laying down, but by way of caution that it would be found at variance with a book of great authority, which it certainly is, for in Sheppard we are told unequivocally that an alien *cannot* make a testament of his lands; not merely that it is voidable.

In Hansard on Aliens, p. 148, it is said "With respect to the capacity of an alien to make a will of real estate, *the better opinion* seems to be that an alien may make a will, more especially considering that his acts are only voidable, and that as against the Crown." He remarks upon the difference of opinion between Roberts and Jarman, but does not refer to Sheppard's Touchstone, nor go more particularly into the matter than we have stated.

We have referred in vain to Powell on Devises, Cruise on Real Property, and the later work of Mr. Crabbe, in all of which one might have expected to find something explicit on the point; nor have we succeeded in meeting with any thing in Comyn's Digest that bears expressly upon it, though we may infer from what is stated in it, under the head "Alien," C. 2, 7, and "Estates by Devise" G., that the power of an alien to devise with any effect is limited to personalty.

In Bacon's Abridgment, "Wills and Testaments," B., indeed it is stated, "that however the wills of traitors, aliens, felons, and outlawed persons are void, as to the king or lord that has a right to the lands or goods by forfeiture or otherwise; *yet the will is good against the testator himself*," (which does not appear to be very intelligible,) "and all others but such persons only." If this article in the abridgment is, as many others in the book are, the work of Chief Baron Gilbert, it should receive great weight from his authority.

In Co. Lit., 2 *b*, the rights and disabilities of aliens in respect to property are stated in a passage which is generally referred to by later writers, but which contains no opinion respecting the power of an alien to devise. The adoption of this statement in later works will in part account for the similar omission which we discover in them; but we confess, we think we can hardly trace this subject through the various text writers, without imagining that in some cases this particular point, of the effect of a devise of real property by an alien, has been passed over not so much accidentally as from an uncertainty as to the footing on which the law really rests.

The case of *Fourdrin v. Gowdey*, (3 Myl. and K. 383,) which was cited on the argument of this case, does not appear to us to support the doctrine that the devise by an alien of freehold can so far have effect as to entitle the devisee to hold under it against all but the Crown. On the contrary, that case turned wholly upon the effect of letters of denization granted to an alien, after he had purchased a freehold estate, which he had devised subsequently to his being made a denizen. It was held that the letters of denization operated retrospectively to confirm the deviser's title, so that though he could only have held before until office found, yet there having been no such office, he had by virtue of his letters of denization a title which he could devise. It seems to have been assumed throughout the case that but for the effect of the letters of denization he could not have devised. The Attorney-General treated it as clear that on the death of an alien his lands vest in the Crown without office. See *Chitty on the Prerogatives of the Crown*, 229, 248; *Doe Hayne v. Redfern*, 12 East 96; *Stamford* 56. (*a*)

On the whole, if this case furnished ground for no other question than that which we have been considering, namely, whether the devisee of real estate, under a will made by an alien, could until office found for the king be held to have an interest, under which he could recover possession of the land from a stranger, we should feel ourselves compelled to say that reason, and the language of the Statute of Wills, 34 & 35, H. VIII., ch. 5, and the weight of authority,

especially of an older date, are against this plaintiff's right to recover on such a title, though modern authority certainly favours it, and we should therefore perhaps be safer in holding the affirmative.

But there is much more to be disposed of in this case. It does not by any means stand upon that question alone, whether an alien can devise real estate, though it was one of the points raised in the case by way of objection on the part of the defendant, and it is an objection on which, if we had thought the defendant clearly entitled to succeed, we must have determined the case at once in his favour.

It is to be considered that the fact of William Wallace being an alien has been found of record, and regularly found, for the commission was directed to a commissioner appointed for the district of Niagara, in which William Wallace was residing before, and up to the time of the departure, and it was found, further, that when he departed he was seised of certain lands in the district of Niagara, which were in consequence properly returned under the statute as forfeited; and the effect of that is that, taking the inquisition and the statute together, he is not only found of record to have been "alien born," but he is shewn by record to have been a person disabled by statute from holding lands within this province. And that is a fact which cannot now be controverted, and indeed nothing appeared upon the trial to warrant the supposition that the verdict of the jury given in 1817, within the district in which the testator had been living, was not quite consistent with the fact. The property which was lost to him and his family, by his having voluntarily withdrawn to the enemy's country during the war, was so valuable that we cannot suppose that he would have lived six years after this public proceeding had taken place without taking the proper steps to traverse the inquisition if the finding had been erroneous in fact; or that his children, and among them the plaintiff, all of whom, according to the evidence, had been born in Upper Canada before his departure in 1813, would have suffered nearly a generation to elapse after they came of age, before they contested the forfeiture.



And now it is contested, not upon the ground that William Wallace has not been rightfully and conclusively held to have been an alien born, and incapable of holding lands in Upper Canada, but because the fact of his having been seised on the 1st of July, 1812, (the day named in the act,) of this land in the Home district, is not otherwise found of record than by an inquisition taken in another district than the Home district, namely, in the district of Niagara.

It is contended, on the plaintiff's part, that the fact of William Wallace's alienage cannot work a disqualification in any one to make title as his devisee to this land in what was once the Home district, for want of its having been found of record by an inquisition taken within the Home district, together with the fact of his having been seised of this particular land. We think the statute unquestionably requires that in order to establish the facts which were necessary to bring a person under the statute there should be an inquisition properly taken within *the* district; that is within *some* district in which he was seised of land on the 1st of July, 1812. Whether the legislature intended that after the alienage has been thus once established by a proper proceeding, under which some land has been regularly returned as forfeited, a similar inquisition must also be made and returned by a commissioner legally acting within any and every other District in which the alien was seised on the 1st of July, 1812, in order to make the consequence of his alienage attach upon those other lands, is a distinct question. At present we think that was probably intended, though it would seem reasonable that the commissioners acting in other districts upon subsequent commissions, should only have been required to receive evidence of the fact of the alien having been seised of certain land within such other district, with a view to make a specific return of such lands.

Upon reading the statutes 8 H. VI., ch. 16, and 18 H. VI., ch. 6, we think we cannot apply their provisions to cases arising under the statute 54 Geo. III., ch. 9; and that the case in 12 East 96, of *Doe v. Redfern*, which contains much learning upon the subject of grants made by the Crown contrary to the prohibition in those statutes, is not therefore

applicable. What the king or lord could or could not do in respect to lands in this province which had been returned as vested in His Majesty by proceedings under the statute 54 Geo. III., ch. 9, must depend upon what we find in that statute, and in the other statute by which it was followed, 59 Geo. III., ch. 12.

But—in connexion with the case of *Doe v. Redfern*, and *Page's case*, (5 Co. 52,) *Reynel's case*, (9 Co. 95,) the *Attorney-General v. Duplessis*, (Parker's Rep. 144,) and with those passages in *Gilbert on the Exchequer*, pages 109, 113, 114, and 132, and in *Manning's Exchequer Practice*, in which the distinction is explained between offices of intitling, and offices of instruction, which latter are intended for the more precise information of the officer who is to put the king in possession, and for the greater notoriety of possession, and of the authority on which it is taken—it is proper to consider here that the fact of alienage is well found in this case by a proceeding to which no exception can be taken, and further, that the fact of the alien being seised of this particular land on the 1st of July, 1812, is also found of record by the same inquisition.

No formal delivery of possession to His Majesty and return of that fact, in order to shew the estate seised into His Majesty's hands, is or can be necessary where, as in this case, there was no person in possession of the estate, nor ever had been, but the same was wholly vacant and unoccupied. In such a case the king is deemed to be in possession by virtue of the office of intitling—that is, by the inquisition—which in this case was taken and returned. Nor could there be any occasion for a proceeding by *scire facias*, and more especially when, as in this case, it is not merely the policy of the law, but a positive statute, which enacts that a person whose conduct has been such as *Wallace's* has been found of record to have been, shall be incapable of holding lands. (a)

It has been objected that the finding the fact of *William Wallace* having been seised of this land in the Home district, if such a finding be indispensable, cannot avail, because it

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(a) See *McDonald v. Bank of Upper Canada*, 7 U. C. R. 284.

was found not in the district in which the lands lie, but in another.

Still it is a fact found of record, if not regularly found. The objection is to the venue. In Lord Vauxe's case, (4 Leon. 26, Pl. 80,) error was brought upon a judgment which had been obtained in the Court of Exchequer upon an information against the defendant for taking goods in the county of Middlesex, and also for intruding into land in the county of Northampton.

It was objected that the Queen (Elizabeth) ought to have brought several bills for several causes of action, arising within several counties. "But it was resolved by the whole court that the bill of the Queen was good enough, and here is no mischief; for if the defendant will plead not guilty, two writs of *venire facias* will be awarded."

In Caverly v. Leving, (Carthew 448,) a motion to arrest judgment on account of wrong venue was refused, for it was cured by the statute of jeofails. (a)

Doubtless these cases, from the nature of this particular proceeding, are not directly applicable, but the principle applies, for it would be unreasonable that the purchaser from the Crown of an estate which the alien had abandoned should be liable after nearly forty years possession, and forty-three years after the title of the Crown to this particular land had been found of record, to be dispossessed on account of an alleged irregularity or defect of this description, when the right to traverse the very facts found, and upon which the right of the Crown wholly rested, had been long since gone.

And this brings us to the consideration of what it has always appeared to me must clearly be decisive in favour of the defendant, namely, the legal effect of our statute 59 Geo. III., ch. 12, in assuring and quieting the titles derived under the Commissioners of Forfeited Estates. That act was passed for the double purpose, as the first clause explains, of providing for the determination and payment of all just claims of creditors or others upon and out of the estates that had been forfeited, either by attainder for high treason committed during the war, or under proceedings taken or to be

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(a) See Attorney-General v. Churchill, 8 M. & W. 171.



taken under the statute 54 Geo. III., ch. 9 ; and after satisfaction of such claims out of the proceeds of the estates which the legislature directed should be sold, of providing for the payment of whatever surplus should remain towards compensating the loyal inhabitants of the province for such losses as they had sustained by the destruction of their property during the war.

Without recapitulating all the enactments in this statute, it will be seen on referring to it, (sec. 2,) that it required the clerk of the Court of Queen's Bench to furnish to the Commissioners of Forfeited Estates, to be appointed under its provisions, extracts certified under the seal of the court of all inquisitions made or taken under the statute, 54 Geo. III., ch. 9, and returned into that court, *whereby any real estate or estates had been vested in His Majesty*, in which extracts should be stated "the names, additions, and places of abode of the persons enquired of by the said inquisitions, and the real estates which by such inquisitions are vested in His Majesty, as the same are described in the said inquisitions respectively, together with the dates of the said inquisitions, and the names of the commissioners by whom they were respectively taken."

These certified extracts the commissioners were required to "enter into a book to be provided and kept by them for that purpose."

And (sec. 3) an extract from that book, signed by two or more of the commissioners is made by the statute legal evidence of the matters therein certified in all courts of justice, so far as may concern the execution of that act, as fully as the record itself would be if produced.

The commissioners are then directed *to sell all the real estates* vested in His Majesty by inquisitions returned under the authority of the act, which estates were by the act vested in the commissioners, and after all claims relating to them shall have been determined by them, which claims the commissioners were to determine, and were to satisfy them out of the proceeds of the estates, (sec. 4.)

The statute requires that the commissioners shall cause their register or book containing the extracts of inquisitions

to be kept by a proper officer, open to the inspection of all who may desire to examine it, in order that the estates vested in the commissioners may be duly published, "*so that all persons having interest therein may have notice thereof,*" (sec. 5.)

And besides this publication of the estates forfeited, a duplicate of every entry in the book was to be sent to the clerk of the peace in each district, who was to enter the same in a book to be kept by him, open for public inspection, and to put up a copy thereof on the door of the Court House, (sec. 6.)

Having thus fully provided for making public all the estates returned under the statute 54 Geo. III., ch. 9, as having been in the possession on the 1st of July, 1812, of persons who had been found by inquisitions to be aliens, the statute proceeds in the 7th, 8th, 9th, 10th, and 11th clauses, to provide for the hearing and adjudication of all claims of a pecuniary kind upon the estates thus returned, and for the payment of them out of the profits of the estates, and out of the proceeds of them when they should come to be sold under the act, and also to provide, before selling the estates, for hearing and determining all claims which might be advanced to the estates themselves, by any others than the persons forfeiting the same, and the heirs, executors, administrators, and assigns of such persons, limiting a time within which all such claims of both descriptions must be preferred or be for ever barred.

As to any claims which the alien himself, or his heirs, executors, administrators, or assigns might have to the very lands themselves, they were left to the operation of the clause in the 54 Geo. III., ch. 9, which expressly preserved the right to traverse the inquisition, to be exercised however within a certain time, which time was in some few cases extended by the legislature, upon application of the parties who had let the time limited pass by, and who applied for such acts within a reasonable period, and probably before the estates had been sold, and had gone into the possession of the commissioners' vendees.

Then follows a provision in the statute (sec. 12) which it

seems to us makes it impossible for the plaintiff to maintain this action. It is in these words, "And be it further enacted," &c., "that all and every the estate and interests which *shall be entered in the register, to be kept by the said commissioners, according to the directions of this act, to or upon which no claim shall be entered within the time and in the manner hereinbefore prescribed, shall be deemed and taken against all persons, and to all intents and purposes, to be vested in the said commissioners in virtue of this act;* and such estates and interests as shall be so entered in the said registry, "and to or upon which claims shall be entered, shall in like manner be deemed and taken to be vested in the said commissioners, subject only to such burthen, diminution, or eviction, as *shall arise from the determination of the claims that shall be so entered, and not otherwise.*"

The next clause (13th) then enacts that the commissioners of forfeited estates, in whom the estates that had been entered in the register shall thus have become vested, shall proceed to sell the same at public auction, giving at least ninety days' notice, and shall execute deeds to the respective purchasers, upon payment of the price bid, which deeds are by the act directed to be registered in the county register.

Surely it is altogether inconsistent with these provisions that the devisee of the alien should be allowed to come thirty-eight years after this estate of William Wallace had been publicly sold under this statute by the commissioners in whom the statute had vested it, in order to its being sold, and to question the validity of the title of this defendant, who soon after the sale purchased from the vendee of the commissioners, and has ever since lived upon and improved the property.

It is true, we think, that the plaintiff is not barred by the Statute of Limitations, 4 Wm. IV., ch. 1, for the land in question in this action being in a state of nature when William Wallace departed from this province in 1813, he cannot be said to have *discontinued* any actual possession which he had ever held of the property, within the meaning of the 17th section of that act. This defendant was the first



actual occupant of the property, and if we should reckon either from that time, or from the time that the estate became vested either in His Majesty, under the 54 Geo. III., ch. 7, or in the commissioners under the Forfeited Estates Act, 59 Geo. III., ch. 12, William Wallace was then resident abroad, and so we assume within the exception of disability arising from that cause. If he had, indeed, come in, he could have sustained no action, while the inquisition remained in force, by which he had been found an alien, and incapable of holding lands in Upper Canada.

This plaintiff, and Wallace's other children mentioned in his will, were born, it appears, in Niagara, before he (Wallace) had departed from the province, and so far as their legal capacity to hold real estate was concerned, they could have taken as devisees whatever Wallace was capable of devising; but the plaintiff does not appear to have been in this province at any time after the vesting of this estate in His Majesty, or in the commissioners, and twenty years before this action was brought; so that we do not see that the case can be affected by any thing in the 17th, or in the 28th, or 29th sections of our Statute of Limitations, for forty years have not yet elapsed since William Wallace can be held to have been dispossessed, unless indeed the vesting of the seisin in His Majesty by the inquisition returned in May, 1817, can be held to have been a dispossession within the meaning of the act, which might be contended for, though we are not prepared to say with success.

On the whole case our opinion is that the plaintiff cannot, upon the evidence, have a verdict entered in his favour, and that the rule that has been obtained must therefore be discharged, for that the title of the purchaser from the Commissioners of Forfeited Estates, and of the person claiming under them, cannot now be controverted, in face of the provisions of the statute 59 Geo. III., ch. 12. Under the 12th clause of that act, this estate became vested in the commissioners, and the commissioners were not only justified in selling it, but were compelled by law to sell it, and their sale cannot be treated as illegal.

The purchaser under the statute has the strongest assurance of a title that the law could give him, and cannot be

less entitled to protection than the purchaser of property at sheriff's sale, under an execution upon a judgment which has been reversed for error; upon which point we refer to Bacon's Abridgment "Error" M. 3, to *Goodyere v. Ince*, (Cro. Jac. 246,) *Hanwood v. Phillips*, (Sir Orlando Bridgman's Reports 464.)

It is clear that under the provisions of the statute, if there were any third party to whom the estate belonged on the 1st of July, 1812, and not to Wallace, such party would have been for ever precluded from setting up his title, if he omitted to advance his claim before the commissioners according to the statute; and it is equally clear that the alien himself, or his heirs, having lost the opportunity of traversing the inquisition, could not be permitted now in an action of ejectment to contest the truth of what has been found by it of record.

William Wallace must therefore be now taken by us to have been *quasi* an alien born, and incapable of holding lands in Upper Canada; and besides the difficulty which the statute 59 Geo. III., ch. 12, places in the way of his heirs, and which we take to be insuperable, we are by no means satisfied that there is any thing in the ground upon which the title of the Crown has been excepted to, namely, that the commissioners and jury sitting in the district of Niagara, could not legally return this land situate in the Home District as having been in the seisin of Wallace on the 1st of July, 1812.

The fact of his being an alien, and incapable of holding land in Upper Canada, was properly found within the district of Niagara, where he resided, and in which district he was seised of an estate, which at least was rightfully returned in the inquisition. If, besides this, an inquisition ought, according to the general rule, to have been taken in the Home District, in order that His Majesty might become seised of any land which Wallace had been seised of in that district, still we doubt if such a necessity under the general rule extended to this case, in which there was no one in possession, nor ever had been, who required to be dispossessed, and against whom His Majesty was in any way called upon to assert his title. We take it that His Majesty could with-

out office found have entered into the vacant lands which had belonged to the alien at any time. But whether such office could or could not have been otherwise dispensed with without the statute 59 Geo. III., that statute had clearly, we think, the effect of vesting this estate in the commissioners under the 12th clause, and it gave them legal authority to sell it.

The rule for entering a verdict for the plaintiff is therefore discharged.

Rule discharged. (a)

### GIBSON AND THE CORPORATION OF THE UNITED COUNTIES OF HURON AND BRUCE.

*Valuation for county rate—Consol. Stats. U. C., ch. 55, secs. 70, 71—By-laws—Construction of.*

It is provided by the Assessment Act, Consol. Stats. U. C., ch. 55, sec. 70.

“ That the council of every county shall yearly, before imposing any county rate, and not later than the first day of July, examine the assessment rolls of the different townships, towns and villages in the county, for the preceding financial year, for the purpose of ascertaining whether the valuation made by the assessors in each township, town or village, for the current year, bears a just relation to the valuation so made in all such townships, towns and villages; and may, for the purpose of county rates, increase or decrease the aggregate valuations of real property in any township, town or village, adding or deducting so much per cent. as may in their opinion be necessary to produce a just relation between all the valuations of real estate in the county, but they shall not reduce the aggregate valuation thereof for the whole county as made by the assessors.”

Upon an application to quash a by-law imposing a county rate:

*Held*, that, except perhaps when a dishonest intention on the part of the council is clearly shewn, (which was not the case here,) the court have no authority to over-rule the valuation on the ground of its alleged unfair or unequal effect.

Remarks as to the proper mode of proceeding under the above provision of the statute.

The Court refused a mandamus commanding the council to proceed as directed by the act, as it was not clear that they had not complied with it by their by-law.

If for all that appears a by-law may be legal it will be upheld; and in this case, where it was not clear upon the face of the by-law, nor otherwise shewn, that the money to be raised by it was for services not belonging to the current year, the omission of recitals and provisions which would in that case have been essential was held no objection.

*R. A. Harrison* obtained a rule on the corporation of the

(a) Another action was brought in the Common Pleas by the same plaintiff against one Adamson, for a different lot claimed under the same title. A question of fact arose there as to the position of the land, which was not presented in the case against Hewitt, but in other respects the evidence was the same, and the Court of Common Pleas also gave judgment in favour of the defendant.



united counties of Huron and Bruce, to shew cause why their by-law No. 8, intituled "A by-law to raise within the united counties of Huron and Bruce the sum of fifty-one thousand dollars for general local purposes for the year 1860," or so much of it as relates to the townships of Morris, Grey, Howick and Turnberry, in the county of Huron, or some one of those townships, should not be set aside with costs.

1. Because the council of the united counties did not, in June last, 1860, when equalizing the valuation in the different municipalities of the said united counties, examine the assessment rolls of the different townships, towns and villages, for the preceding financial year, in order to ascertain whether the valuations made by the assessors in each case for the current year bore a just relation to the valuation, &c., made in all such townships, towns and villages in the said united counties.

2. Because the valuations in the different townships, towns and villages in the county of Bruce, as pretended to be equalized by the council, bore no just relation to the valuations in the townships, towns and villages of the county of Huron, but were made and equalised independently of them.

3. Because the valuations in Huron were not made to bear any just relation to each other; but new townships—such as Morris, Grey, Howick and Turnberry—were excessively and disproportionately taxed, as compared with the older townships of Tuckersmith, Goderich, Colborne, and Biddulph, which is contrary to the statute.

4. Because the council, while pretending to equalise the valuations of the united counties for the purpose of county rates, did not diminish or increase the aggregate valuation of real property in the different townships, towns and villages in the united counties, by adding or deducting so much per cent. as might be necessary to produce a just relation between all the valuations of real estate in the united counties; but proceeded arbitrarily to classify the townships of the united counties at certain rates per acre, without regard to the aggregate valuations of real property in such townships, towns and villages.

5. Because such classification and valuation, as regards

new townships in Huron, compared with the valuations in older townships in the same county, was unjust and erroneous, and tended to impoverish and ruin the new townships.

6. Because the by-law moved against, in apportioning the rate among the municipalities in the united counties, related to the valuations for the preceding financial year, rather than to those for the current year as compared with those of the preceding financial year, which is contrary to the statute.

7. Because the by-law is in other respects illegal.

And the rule also called upon the municipal council of the united counties to shew cause why the by-law No. 9, entitled "A by-law to raise by assessment within the county of Huron the sum of \$46,213, for the purpose of paying interest and sinking fund on the gravel road debentures, and improvement of roads and bridges within the county of Huron," should not be set aside with costs.

1. Because, for the reasons before stated (in relation to the by-law No. 8) the equalised assessment rolls of the townships, &c., in the united counties, for the current year, are unjust and illegal, and have no just relation to the valuation made in such townships, towns, and villages.

2. Because the council did not proceed according to law in equalising the valuations.

3. Because the pretended equalisation so made bears oppressively upon the new townships, as compared with the older, more populous, and more wealthy townships.

4. Because the by-law No. 9, instead of imposing a rate for the purposes mentioned in it, upon the whole rateable property within the jurisdiction of the united counties of Huron and Bruce, restricts the rate to the former county, and expressly excludes the latter county from its operation.

5. Because it is not shewn on the face of the by-law that the debts mentioned in it are debts falling due within the current year.

6. Because the by-law leaves it uncertain whether the money to be raised under it is to be applied to debts contracted before the passing of the by-law, or to debts contracted by it.

7. Because, according to the recitals in by-law No. 9, the

money is to be raised for one object, viz., for paying the interest and sinking fund on debentures issued for making gravel roads in the county of Huron, and in providing roads and bridges in that county, without stating when or for what account such debentures were issued, or when payable, and by what authority issued; and by the enacting clause it appears that the money is to be expended for two objects; namely, to pay the interest of the gravel road debentures, and for the improvement of roads and bridges, without stating what roads and bridges, in the county of Huron; and so the by-law is inconsistent and uncertain.

8. Because, if the objects be two, it does not appear what portion of the money to be raised is intended for one, and how much for the other.

9. Because no day is named in the financial year in which the by-law was passed, for its taking effect.

10. Because the by-law does not state when the debts mentioned in it are payable, or their amount.

11. Because the by-law is in other respects illegal.

And in this same term, *R. A. Harrison* obtained also a rule on the defendants, to shew cause why a writ of mandamus should not issue, commanding them to examine the assessment rolls of the townships, towns and villages in the said united counties, for 1859, for the purpose of ascertaining whether the valuation made in each township, town, &c., for the current year, bore a just relation to the valuations, &c., made in all such townships, &c.; adding or deducting so much per cent. as might be necessary to produce a just relation between all the valuations of real estate in the united counties; but not to reduce the aggregate valuation thereof for the whole united counties, as made by the assessors, according to the true intent of the statute in that respect; and to take care that the valuations in the townships of Morris, Grey, Howick and Turnberry, in the said county of Huron, bore a just relation to the valuations of real property in the townships of Tuckersmith, Goderich, Colborne and Biddulph, and all other the townships, towns and villages of the united counties; and to do whatever the court might see fit to command in the premises.



The by-law No. 8 was passed on the 30th of June, 1860. The by-law No. 9 was passed on the same day.

By-law No. 8, passed on the 30th of June, 1860, recited that it was necessary to raise and levy upon all the rateable real and personal property liable to taxation in the united counties of Huron and Bruce, \$51,000, for general county purposes, for the year 1860; and it specified what those purposes were and the sum required for each. Among these were administration of justice, salaries, and councillors' fees, grammar school, printing, stationery, &c., jurors, contingencies, township treasurer's commission—giving an amount for each; and besides those the following: court-house debentures, \$1,160; Maitland bridge debentures, \$2,596; Bidulph gravel road debentures, \$1,280; Municipal loan fund debentures, \$26,640;—the whole making up the \$51,000. It then recited that the amount of rateable property within the counties of Huron and Bruce amounted to \$11,182,040, according to the equalised valuation of the different municipalities within the said united counties for 1859; and that it would require the sum of 4½ mills in the dollar, to be raised upon the equalized assessed value of all the rateable real and personal property within the said United Counties of Huron and Bruce, to make the sum of \$51,000, to be expended as set forth above. And it enacted that there be raised, levied and collected from all the rateable real and personal property within the United Counties, liable to be assessed within the then present year, (1860), \$51,000, to be expended as set forth in the foregoing schedule. And (sec. 2) that the \$51,000 be apportioned and levied from the respective municipalities within the said United Counties, according to the equalised value of the assessments for 1859, as their contingent proportion respectively of the sum required for the purposes before mentioned, and which are more particularly set forth in the schedule at the end of the by-law, and forming part of the same. Sec. 3.—And that the sum to be collected should be paid to the county treasurer by the collector, and be by him paid to the County Council on or before the 25th December, 1860, who should apply the same to the purposes mentioned in the by-law.

Then in the schedule was set down the proportion that each municipality had to pay of the \$51,000. This formed the whole of that by-law.

The by-law No. 9 recited that it was necessary to raise \$46,213, for paying the interest and sinking fund on the debentures issued for making gravel roads in the county of Huron, and improving roads and bridges within the said county; and that the town reeves for the county of Bruce were unwilling that a like or any proportionate sum should be raised within the county of Bruce; wherefore it was necessary to levy a special rate upon the county of Huron for the said purposes. It next recited that the amount of rateable property in the county of Huron was \$7,675,229, according to the last equalized assessment rolls of the municipalities within the said county of Huron, being for the year 1859; and that it would require six mills in the dollar fully to be raised upon the equalised value of all the rateable real and personal property in the county of Huron to make up the \$46,213. And sec. 1 enacted that there be raised, &c., upon the property, real and personal, within the county of Huron liable to be assessed during the present year, 1860, \$46,213 as a special tax over and above all other rates and taxes, to be expended in the payment of the interest and sinking fund of the gravel road debentures, and the improvement of roads and bridges in the county of Huron. Sec. 2 enacted that the \$46,213 should be apportioned and levied upon the said respective municipalities within the said county of Huron, according to the equalised value of their assessments for the year 1859, as their contingent portion respectively of the sums required for the purposes before mentioned, and which were more particularly set forth in the schedule at the end of the by-law, and forming part of the same. Sec. 3. And that the sums so to be levied, &c., should be paid over by the collectors to the proper officers as provided by law, and by them paid over to the County Treasurer on or before the 25th December, 1860, who should apply and pay the same to the purposes for which they had been specially appropriated by this by-law. Then followed a schedule specifying the proportion of the \$46,213 that

each municipality had to pay. This formed the whole of by-law No. 9.

The applicant, Gibson, made an affidavit that he was an inhabitant and ratepayer of the township of Howick, in the county of Huron, and as such had an interest in the by-law, and a copy of the by-laws was stated by him to have been received by him from the clerk of the united counties, as they stood in the printed pamphlet annexed to his affidavit. The clerk certified them to be true copies, and that they were passed on the 30th of June, 1860. Gibson swore that he received them certified under the corporate seal. The clerk refused, he said, to give him a copy otherwise than by certifying at the foot of each by-law as printed in the pamphlet.

*Richards*, Q. C., shewed cause. He cited Consol. Stats. U. C., ch. 55, secs. 70, 71, 72, ch. 54, secs. 222, 288, 289, 292.

*Harrison* supported the rules, citing Tylee and The Municipality of Waterloo, 9 U. C. R. 575; *Regina v. The Commissioners of Land Tax for the Tower Division*, 2 E. & B. 694.

The contents of the affidavits filed are sufficiently stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The by-law No. 9 seems to be sufficiently verified, though I confess I was long in detecting the seal, if it can be called one, to the clerk's certificate.

Then, as to the by-law No. 8, we do not see that we should be justified in setting it aside on the grounds stated, when we find how the complaints and objections of Gibson are met. Most clearly we have no authority to place ourselves in the situation of the council and to judge for them, still less to place ourselves above them and overrule their valuation upon our ideas merely of what would be more just and more reasonable in regard to amount. They are to be the judges, and undoubtedly they have better means of judging than we have. We speak now merely in reference to what is com-



plained of as to the hard and unequal effect of the valuation. There is no question that they were bound to conform to the directions of the statutes in the method of proceeding; that is, they are not to violate them. It is imputed to them that they have done so in this case; but we do not see that that is made out satisfactorily, when we look at the affidavits on both sides.

The affidavits filed in answer to this application state positively that the council did examine the assessment rolls of the year 1859, as well as those of the current year 1860, and we cannot therefore assume that the contrary statements are true, and act upon them as if they were undisputed. So, also, as regards the alleged unequal operation of the by-law, the statements are denied on oath and in a very circumstantial manner; and we repeat that, as regards the reasonableness of the valuations, and the conclusions to be come to on that point by comparing the value set upon land in one municipality with the value set upon land in another, it is not our province to judge of that; and if it were, still there are various circumstances to be taken into consideration as bearing upon the question of computation and value, which we have not the means of judging of, for want of that local knowledge which the members of the council, chosen by the people themselves, must be supposed to possess, and doubtless do possess. It is not merely the fact that one township has been long settled, and another not so long, that should alone influence the judgment in making the comparison, nor the number of inhabitants, though these are circumstances that naturally should have been, and we may suppose must have been, taken into consideration. Quality of soil and of timber, abundance or scarcity of water, convenience of communication by land or water, distance from market, and the description of inhabitants as well as their numbers, are matters that require to be considered in comparing one township with another; and when these and all other matters have been considered, the conclusions which they may seem to lead to are by law to be formed by the council and not by this court.

We do not mean to say that there might not be some case so extraordinary in its circumstances as to warrant this court

in giving effect to complaints urged against a by-law of this nature, which might be more or less connected with the propriety of the valuations settled by the council under the 70th and 71st clauses of the existing Assessment Act (Consol. Stats. U. C., ch. 55). It is not necessary to determine that point, for certainly this does not appear to be a case in which injustice can be shewn to have been done, so monstrous and so manifest as to leave no doubt that the council did not exercise that authority with an honest intention. Doubtless the council were bound to follow the directions of the statute in their method of proceeding; but having read the affidavits on both sides, we think we cannot say that they have disregarded the directions of the legislature.

As to the land in the one county being valued independently, and without regard to the value of the land in the other county, that appears to be satisfactorily disproved.

The fourth objection is repelled by the affidavits filed on the part of the council.

The legislature, indeed, have not attempted to prescribe by what method of proceeding the townships, towns and villages shall be made to bear a just relation to each other in regard to the assessed value of property. They could hardly have succeeded in any attempt to do so. It must of necessity be left to the judgment of those who are to conduct the operation. We may suppose the council fixing upon some one township or town, &c., in the first place, as that in which the value appears to have been assigned with the strictest regard to truth and justice; and then, having selected such a standard, we may suppose them taking up each other township, town, &c., and adjusting the valuation by such standard. In doing this the council must be governed by their own judgment, and could not in the nature of things have any rule given to them by which they could arrive at any particular result. It must be entirely a matter of opinion, whether if land cleared or uncleared in township A. is valued at such a sum per acre, land in township B. ought to be valued at any and what other sum per acre. When the council shall have adjusted the proportionate value which land in one township bears to land in the other, and shall

have compared them all by some one standard, then they have to ascertain and express how much per cent. must be added to or deducted from the assessments in each township respectively to make them all bear a just relation to each other. That is not given as a rule or method of proceeding that can guide or assist the council in adjusting the relation between the several townships, but as a method by which they are to express to the collectors the effect of the relation which they have established, as leading to an addition or deduction of so much per cent. to or from the assessment of each individual, according as they have found the assessment that had been made in the particular township too high or too low as compared with the standard which they have resolved to abide by. This direction to the collector makes his duty afterwards simple and precise enough. But the business of the council in equalising the assessments so as to make all the townships, &c., bear a just relation to each other, is one that cannot be accomplished by any arithmetical calculation. No two bodies of men, and no two individuals, could be expected to arrive at the same conclusions if they attempted to make the adjustment independently of each other. The legislature have not attempted to instruct them how they are to proceed in order to do equal justice; they have done the best they could in committing the duty to them, in general terms, of equalising *the assessments* so as to *produce a just relation*, but have necessarily left it to them to work out the problem as they best can. It is a thing more easily talked of than done. I confess I think that, although the person who framed the 70th and 71st clauses of ch. 55, Consol. Stats. U. C., may have understood very clearly himself what he intended, he has not succeeded in making his meaning quite intelligible to others.

As regards the other by-law, No. 9, besides taking some of the objections to it which were made grounds of complaint against by-law No. 8, an additional objection is taken (the 4th objection) for which there certainly is no foundation, for the 288th section of the Municipal Act expressly provides "that the councils of united counties may make appropriations and raise funds to enable either county separately to



carry on such improvements as may be required by the inhabitants thereof." In that respect therefore there has been nothing wrong done by this by-law. (a)

There are objections of another kind made to this by-law, which are all founded upon the assumption that it is a by-law passed for raising money for services not belonging to the current year, or to pay debts not falling due within that year. But we do not see that we should be warranted in treating this by-law as one of that description. For all that appears on the face of it, it is open to no such objection. The interest and sinking fund spoken of may have no relation to any other than the current year, and the same may be said as to the improvements of roads and bridges, which required money to be laid out upon them. The statutes do require that by-laws to be passed for certain purposes shall contain particular recitals and provisions, but from the absence of any such recitals and provisions we are not at liberty to infer any thing against the validity of the by-law, unless we can see clearly on the face of the by-law, or have otherwise shewn to us, that the by-law was passed for a purpose which required them to be inserted. If, for all that appears, the by-law may be legal, we are not to conjecture the existence of facts that would render it illegal. It is upon this principle that awards made by individuals are dealt with, and we should not be less considerate in upholding by-laws made by municipal councils, which are chosen by the people, and are intrusted by the legislature with extensive powers. (b) It is difficult to foresee how much public inconvenience may be sometimes occasioned by quashing by-laws after they have been acted upon, and though this can never be admitted as a reason for sustaining what has been clearly shown to be illegal, it is a strong reason for declining to quash a by-law except on some clear grounds. We do not see any case of illegality clearly made out against the by-laws now moved against, and therefore discharge the rule for quashing them, with costs.

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(a) This objection having been raised by inadvertence was abandoned by counsel on argument.

(b) See *Cameron and the Municipality of East Nissouri*, 13 U. C. R. 190.

As to the application for a mandamus, we do not see the necessity for giving any such general directions to the municipal council as we are asked to give. We do not find that they have violated the statute in their mode of proceeding, or that they have left any thing undone which they were required to do. The case cited of the Queen v. The Commissioners of Land Tax for the Tower Division of Middlesex, (2 E. & B. 694,) is only an authority for shewing that the court may issue a mandamus to compel a legal and just assessment, when they see a clear ground to interpose, but the reasoning in the case, and the manner in which it was disposed of, shews that the court will not interpose unless upon some specific and clear ground.

We think this rule also must be discharged with costs.

Rules discharged.

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During this term the following gentlemen were called to the bar:—ALEXANDER MAIRS, THEODORE HENDERSON SPENCER, JOHN LIVINGSTON, DAVID BLAIN, THOMAS HENRY BULL, JAMES ALEXANDER McCULLOCH.

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August 27th, 1860.—The following rule was read in court:—

IN THE COURT OF QUEEN'S BENCH AND COURT  
OF COMMON PLEAS.

TRINITY TERM, 24 VIC., 1860.

1st. It is ordered, that from and after the first day of this present Trinity Term, 24 Victoria, Rule No. 155, of this Court of Trinity Term, 1856, be rescinded, and that the following be substituted therefor:—No. 155. In any action of the proper competence of the county or division courts respectively, in which final judgment shall be obtained by a plaintiff without trial, or in which plaintiff shall obtain execution on proceedings in the nature of a final judgment, no more than county or division court costs, as the case may be, shall be taxed without the special order of the court or a judge, but this rule shall not extend to costs on interlocutory proceedings.

2nd. It is also ordered that rule No. 16, of Trinity Term, 20 Vic., be rescinded, and the following substituted therefor: The offices of the clerks of the Crown and Pleas shall be kept open as follows: that is to say, during term from ten in the morning till four in the afternoon, and (except between the 1st day of July, and 21st day of August) at other times from ten in the morning until three in the afternoon, Sundays, Christmas day, Good Friday, Easter Monday, New Year's Day, and the birthday of the Sovereign, and any day appointed by general proclamation for a general fast or thanksgiving, excepted; and between the first day of July and twenty-first day of August, both days inclusive, when the said offices shall be open from half-past nine in the forenoon until twelve o'clock noon.

JNO. B. ROBINSON, C. J.  
WM. H. DRAPER, C. J. C. P.  
A. McLEAN, J.  
ROBT. E. BURNS, J.  
WM. B. RICHARDS, J.  
JOHN H. HAGARTY, J.



MICHAELMAS TERM, 24 VICTORIA, 1860.

*Present:*

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD McLEAN, J.

“ ROBERT EASTON BURNS, J.

IN THE MATTER OF JOHN ANDERSON, COMMITTED UNDER  
THE EXTRADITION TREATY WITH THE UNITED STATES.

*Extradition—Murder committed by a slave to prevent capture—Ashburton treaty—Consol. Stats. C., ch. 89.*

A., being a slave in the state of Missouri, belonging to one M., had left his owner's house with the intention of escaping. Being about thirty miles from his home he met with D., a planter, working in the field with his negroes, who told A. that as he had not a pass he could not allow him to proceed, but that he must remain until after dinner, when he, D., would go with him to the adjoining plantation, where A. had told him that he was going. As they were walking toward's D.'s house A. ran off, and D. ordered his slaves, four in number, to take him. During the pursuit D., who had only a small stick in his hand, met A., and was about to take hold of him, when A. stabbed him with a knife, and as D. turned and fell he stabbed him again. D. soon afterwards died of his wounds.

By the law of Missouri any person may apprehend a negro suspected of being a runaway slave, and take him before a justice of the peace; any slave found more than twenty miles from his home is declared a runaway; and a reward is given to whoever shall apprehend and return him to his master.

A. having made his escape to this province was arrested here upon a charge of murder, and the justice before whom he was brought having committed him, he was brought up in this court upon a *habeas corpus*, and the evidence returned under a *certiorari*.

It was contended that as A. acted only in defence of his liberty there was no evidence upon which to found a charge of murder if the alleged offence had been committed here, and that he could not be demanded by the treaty.

*Held*, that under the Ashburton treaty and our statute for giving effect to it, Consol. Stats. C., ch. 89, the prisoner was liable to be surrendered.

McLEAN, J., dissenting, and holding that the information, warrant of commitment, and evidence, (to which no objection was taken on argument,) were insufficient: that if the charge had been clearly made out the case was not within the treaty; and that the prisoner therefore was entitled to his discharge.

The prisoner, John Anderson, having been arrested upon a charge of murder committed in the state of Missouri, a writ of *Habeas Corpus* was granted, upon which he was brought up from the gaol of the county of Brant.

He was a negro, and had been a slave in that state. The homicide was admitted, but it was contended that as the person killed was at the time in pursuit of the prisoner, who was endeavouring to escape from slavery, and acted only in defence of his freedom, the evidence failed to shew any ground for a charge of murder according to our law, and that the surrender of the prisoner could therefore not be claimed.

The magistrate committed the prisoner, but the question being one of importance, the government desired to obtain the opinion of the court upon the legal construction of the treaty; and upon the argument the counsel for the prosecution expressly waived all objection to the right to review the justices' decision.

The case having excited much attention both here and in England, the evidence and proceedings before the magistrates are given at length, as filed upon the return to the writ of *Habeas Corpus*, and under a *Certiorari* which had issued to the justices.

## INFORMATION.

PROVINCE OF CANADA, } The information and complaint of  
COUNTY OF BRANT. } James A. Gunning, of the City of  
Detroit, in the State of Michigan, taken this thirtieth day of  
April, in the year of our Lord one thousand eight hundred  
and sixty, before the undersigned, one of Her Majesty's  
justices of the peace in and for the said county of Brant,  
who saith that one John Anderson did on the 28th day of  
September, A. D., 1853, wilfully, deliberately, and mali-  
ciously murder one Seneca T. P. Diggs, in the county  
of Howard, in the State of Missouri, one of the United  
States of America; all of which this deponent doth verily  
believe.

(Signed) J. A. GUNNING.

Sworn before me, the day and year first above mentioned,  
at Brantford.

(Signed) W. MATHEWS, J. P.

## EVIDENCE.

BRANTFORD, Sept. 27, 1860.

PROVINCE OF CANADA, } Examination of John Anderson,  
COUNTY OF BRANT, } charged by J. A. Gunning with  
To wit: } having wilfully, deliberately, ma-  
liciously, and feloniously murdered one Seneca T. P. Diggs,

of Howard County, in the State of Missouri, one of the United States of America, on the 28th day of September, 1853.

Prisoner, by counsel, G. M. Wilson, Esq., denies the charge.

*William C. Baker*, sworn, says.—I live in Howard county, in the state of Missouri. I have lived there ever since 1844, except one year, I lived in the same state during that time, part in Saline county and part in Jackson county. I work at the carpenter trade, and sometimes work on a farm. I know the prisoner. He was a slave and belonged to Moses Burton, of Howard county, state of Missouri, where I first knew him. I became acquainted with him in the fall of 1844. He lived with Mr. Burton when I went to Missouri in 1844, and continued with him until 1853. He went by the name of Jack Burton. The last I saw of him was in 1853, until I saw him in this country. I am certain of Anderson's identity. I did not see him from 1853 until I came here. Burton transferred him in 1853 to McDonald, of Saline county, about thirty or thirty-two miles away (that is Burton's from McDonald's). Anderson had a wife. She lived with Samuel Brown, in Howard county. That was a mile and a half or two miles from Burton's. I know a man of the name of Givens. He lived about six miles from Brown's. Seneca T. P. Diggs and Givens lived on adjoining farms. I know Anderson was in the neighborhood of Brown's in September, 1853. I live in the neighbourhood of Brown's since 1853. I have not heard of Anderson being there since 1853. I first saw Anderson in Simcoe gaol, in Canada; he was brought out, and two others, coloured persons, with him; I knew him the moment I saw him. He has a mark on his fingers; his right fore-finger is stiff on the joint; I heard he had a cut on one of his legs; don't know this from own knowledge. Diggs, Brown, Givens, and myself, all lived in Howard county. Diggs is not now living. I saw him lying in bed suffering from a wound he received from a knife; he died in fourteen days after he was stabbed. He lived four days after I last saw him. I saw him twice after he was wounded. The first time I saw him he told me that a man by the name of Jack, who belonged to a man of the name of McDonald, of Saline county, was passing his farm and spoke to him, and asked him the way to Charles Givens. Diggs said he told him to go in and eat dinner, and he would go to Givens' with him. He further stated that he started to go to the house. He (Diggs) thought that Anderson was going in. Jack told him that he was going to



Givens' for the purpose of getting Givens to buy him. He then broke and ran away. He called out to his black boys to catch him. They ran in a circle, and after running for some time, when Mr. Diggs was going over a fence, Jack came in contact with him and stabbed him. I saw one cut in his right side. The doctor told me he would die. This took place the same day. He seemed to be suffering very much when I saw him. The doctor said he would die from the wound.

*Cross-examined by Mr. Wilson.*—I knew he had a stiff finger ever since I was acquainted with him; don't know how he got it. I have frequently had hold of his hand. I saw Anderson once in September, 1853, in Howard county, a day or two before the cutting of Diggs. He was on Brown's farm; he was running from a couple of my neighbours, to keep them from taking hold of him; they wanted to deliver him up to McDonald. He had been out from McDonald's about three weeks. They supposed Anderson had ran away from McDonald, as his wife was on that side of the river. Mr. Diggs said he asked Anderson if he had a pass. There have been slaves escaping occasionally from there. I did not swear that Diggs told me he had received but one cut. The doctor's name was Samuel Crewse; he was understood to be a regular physician, practising for years. The county of Howard employed me to come over here. I have no authority. I came to identify the prisoner. The county of Howard is to pay me for this. They pay my expenses and two dollars and a half per day; I draw it from the clerk. The clerk's name is Charles H. Stewart. I am not paid from other persons or from other sources. Mr. Diggs, when I first saw him, understood what he was talking about.

The case was adjourned until ten o'clock next day, but at the request of counsel on both sides it was resumed on the same day.

Messrs. *Freeman* and *Tisdale* appeared for the prisoner; Messrs. *Van Norman* and *McKerlie* for the plaintiffs.

*W. C. Baker, re-called.*—I live in Howard county, state of Missouri. Anderson was a slave there, in Missouri. I did not see the wound made. Diggs told me it was about dinner-time when he first saw Anderson. He asked him to take dinner at his house, when Anderson broke away from him. Diggs was trying to stop him. Diggs was trying to stop him from running away from his master, McDonald. I understood he was going to be sold. He went towards

Givens', to induce him to buy him. A slave does not sell himself, but sometimes he tries to get an exchange of masters; but they have no right by law to do so. He was going to induce Givens to buy him. Diggs told him the law of the state compelled him to stop him if he had no pass. Diggs asked him to go to his house. Diggs and they started to the house. When they got on a piece Jack broke loose and broke away. It was at dinner-time when he saw Jack first, and told him to go to his house and get dinner, and he would go along with him. After he broke and ran away from him the parties who pursued him made a circle. Jack ran in a circle. Diggs called to his black boys to catch him. They started after him. There were three or perhaps more black boys. Diggs was going to stop him to return him to his master, McDonald, in slavery. It was in that pursuit that Diggs was stabbed and got his death blow. Did not understand from Diggs it was to do Jack any harm. They tried to catch him, but merely to retain him.

*Examined by Messrs. McKertie and Van Norman.*—From the time I knew Anderson his character was bad; he was savage and ill-disposed. As they were making a circle Diggs was getting over a fence. Jack was coming towards him and tried to stop him, and he, Diggs, was going to take hold of him to stop him. Jack was coming towards him and stabbed him.

*Examined by Mr. Freeman.*—As Diggs got over the fence they came in contact, and he received the stab. Diggs had gone to the fence to stop him, so he said to me. The prisoner had difficulties with the man who raised him. He refused to do what he was bid, and on one occasion he refused to catch his master's horse when he was told. He and his master had some words; there were no blows struck. Don't know personally any other act, but his public reputation was bad for stealing and being a thief. Don't know he was ever convicted. The neighbours said he stole. Don't know he ever stole from his master. He was accused for stealing chickens, eggs, and butter. Don't know that he was ever brought before a justice for it. Samuel Brown accused him of this. Jno. M. Harris and Jno. C. George Brown accused him for stealing eggs, the others of butter and chickens. Can't say when it was. These accusations are common there against the coloured people. It was in 1847 and 1848 I heard this. He was there at this time, but he was not taken up for any of these things.

*Thomas D. Diggs, sworn.*—I am the son of Seneca T. P. Diggs, of Howard county, state of Missouri. I have always

resided at home ; was not at home when my father received his wounds. When I returned home I found my father in bed. He was suffering very much ; he never rose from a bed of suffering ; he never spoke of recovering ; he thought he would not get well. The doctor told the family my father would not get well. Two or three days before my father died he wished to speak to me, and I went to him, and he said he would soon be dead, he could not live much longer. He spoke of my mother and brother and sisters. He spoke of the cutting affair. He said he went to the barn with the hands to take in tobacco ; he got through before 12 o'clock, or a little before. He started for dinner. He came across a nigger. He had no pass. He asked him where he was going and who he belonged to. The nigger told him he was going to Charley Givens to get him to buy him. He belonged to a man on the other side of the river of the name of McDonald. He said he did not want to live on the other side of the river. Samuel Brown had his wife. My father asked him if he had a pass. He said no. My father told him it looked suspicious living so far off ; he must be a runaway. My father told him he could not allow him to go without a pass, as he would be held responsible. He told him to go to the house and get his dinner, and he would go with him to Charley Givens' and he would see about the matter. He started on to the house. The negro was going on very quietly. All at once he started off and ran. He said he told his negroes to catch him. They started after him, and he went with my brother. He was not able to go so fast and he stayed with him. After they had run around some time the negro met him. The negro ran at him and stabbed him. He had a little stick in his hand, and as the negro ran at him he struck at him. The negro cut him a little in the wrist ; he then stabbed him in his breast. The blow stunned him. He turned to leave and his feet caught in something, and while he was in the act of falling, or had fallen, he stabbed him again in the back. The negro then immediately ran. The paw-paw is a very light wood ; it never grows large. The one my father had was small. I am twenty-five years old last December. My father was a delicate man, slim and small ; his height was six feet. He was slight, spare-made ; he would not be able to cope with the prisoner. His health was not good. They considered the negro a runaway. My father was about thirty miles from McDonald's, as I have heard. He did not live in the same county with father. I suppose my father wanted to catch the negro. I would suppose he wanted to return him to the owner ; he was a slave,



I have no doubt. Prisoner is about five feet eight or nine inches; his weight is about one hundred and sixty or seventy pounds. My father's usual weight was about one hundred and thirty-five or forty pounds. When the negro ran at my father he had the knife drawn in his hand.

*B. Hazelhurst, sworn.*—I live in Brantford; am a county constable. Prisoner made no statement to me but what he said in court; he said he was attempting to get away and he cut a man, but he did not believe he was dead. This took place in the state of Missouri. He said he was chased in attempting to get away and he cut a man. I understood he was getting away from slavery.

*S. B. Freeman*, counsel for prisoner, consents that the evidence of Phil, a slave, shall be taken as evidence.

*Phil*, a slave, the property of Frances A. Diggs, widow of Seneca T. P. Diggs, of lawful age, being produced, sworn, and examined, deposeth and saith: Next fall will be seven years ago a negro man came to us, (my master, Seneca T. P. Diggs, and the balance of the negroes,) in my master's field. My master asked him if he had a pass; he said he did not have a pass; master told him he could not let him go clear without a pass. He told my master that a man by the name of Burton raised him: that he now belonged to a man over the river by the name of Macdonald: that he had a wife at Mr. Sam. Brown's, in Howard county: that he was then going to Mr. Givens to get Givens to buy him. Master told him he could not let him go on that way without a pass; that he must go on up to the house and eat dinner, and then he would go with him up to Mr. Givens. He told master that his name was Jack. Just before we got to the house the negro broke and ran. Master told us negroes to run after him. We ran after him. Master said we should have the reward if we would catch him. While we was running him he took out his knife. We runned him around a good long while; master would halloo all the while and we would answer him; at last master met the negro, and I saw him cut master twice with a knife. I saw him when he run at my master with the knife. While we were running after him he said he would kill us if we came near him. We ran after him some time after he stabbed master, but could not catch him. The negro that killed my master was named Jack. He once belonged to Moses Burton, of Howard county, and had a wife at Sam. Brown's. I knew him and have seen him before the day he killed my master. This happened in Howard county, Missouri, in the United States of America, in the year 1853.

(Signed,)

PHIL, <sup>his</sup> + a slave.  
mark,

Sworn to and subscribed before me this day and year aforesaid.

(Signed) J. A. HOLLIDAY, J.P.

*J. A. Holliday, sworn.*—I live in Howard county, state of Missouri; have lived there since the month of June, 1829. I was born there; am a lawyer by profession. The first section, 3rd article, of the act concerning slaves, revised statutes of 1845, for the state of Missouri, provides, any person may apprehend any negro or mulatto being or suspected of being a runaway slave, and take him or her before justices of the peace. The second section provides, that the justices shall take possession of and deliver him or her to the owner. The 18th section of the same article provides, that any slave found to be more than twenty miles from home shall be declared to be a runaway. The 16th section provides, that any one apprehending a runaway shall be paid the sum of \$5 as a reward if taken within the state, and \$50 if taken without the state, and ten cents for every mile of travel in order to convey the runaway home to his master. This law was in force in 1853 and is still in force in substance. I heard of the death of Mr. Diggs at the time it took place, and have not heard of the death of any other person there since in that way, nor for several years before. I don't know that I ever saw prisoner until the other night; I may have seen him, but don't know that I have.

*Benjamin F. Diggs, sworn.*—I live in Howard county, state of Missouri, United States of America. I am fifteen years old on the 30th of May last. I am son of Seneca T. P. Diggs. He is now dead. He died in the fall of 1853, in the month of November of that year; on the 11th I think. The cause of his death was two wounds he received from a coloured man who inflicted them with a knife, about twelve in the day. Father was a farmer. I was with father when he was stabbed, about five or six yards from him. He was in pursuit of the negro when he was stabbed. I was with father when he first started in pursuit of him. Other parties, say four black boys of my father's, were following up. I was with father and could not keep up, and he stayed with me. When he was stabbed he had got over the fence. When the nigger had got to them I was on the fence. Father was about six yards from the fence. Saw him stab father. There was nobody with the man or father but me. I saw the knife; it was a long dirk knife. Father was first stabbed in the breast. After that father turned to run away and hung his foot in some vines and fell. The man then stabbed him

in the back, and then broke and run. Father got up and walked a piece and fell, about fifteen or twenty yards. This was about a mile from our house. Father lay about an hour where he fell last. No one was with him but me during that time. I saw his wounds; he pulled down his shirt and showed them to me—two wounds. I saw them inflicted by this man; one on the breast, the other on the back. The other parties were still running after the nigger. After this we heard some one halloo, and father told me to answer. Father was not able to get up. Dr. Crewse and one of our own nigger men first came up. The doctor lived about half a mile from where father was stabbed. After a while another of our niggers came up, and he and I went to Bass's to get quilts to carry him over the creek; they lived about a quarter of a mile off. A sleigh was brought, drawn by a horse. Father was put on the sleigh and taken to Dr. Crewse's. He stayed there till he died. He never went home after; had never seen the man who stabbed father before that time. The prisoner is about the colour and size of the man, but I would not swear he is the man.

*Cross-examined by Mr. Freeman.*—I was not present at the first. What I saw first was father and some of the black boys. One told me it was a runaway. There were two men and boys, from seventeen to nineteen years of age; they were walking along. I asked one of the boys who the strange black man was. He told me some one said he was a runaway. I walked along towards our house to dinner. This man was going along. They came in sight of a house in the field, when the stranger broke and ran, and left the rest; that is, he ran away from the rest through the woods from the others pretty fast. He appeared to run as if he was trying to run away; don't know what the others thought. They ran after him. Father told them to run after him. Father wanted to give him back to McDonald. Moses Burton used to own him. He tried to get away so that father could not deliver him back to his master. Father told the boys to go after him and catch him; they were present. There were four went after him; all blacks. Father told them to catch him. Father also ran after him. Don't remember if he halloed, but he went after him. The nigger and one man ran in a circle. Father and I went across, and father had just got over the fence when the nigger and he met; did not hear any words pass. I took a deposition once before Mr. Holliday, J. P. Father had a little stick in his hand. The negro ran at him with an open knife drawn in his hand. It was a paw-paw stick. My father struck at him with the stick, after the nigger had run at him



with the open knife. The stick hung in some bushes and broke. The nigger then stabbed father. Father raised the stick to keep the nigger from cutting him with the knife as he ran at him. They had run across our wood pasture before this happened; it would be between a quarter and half a mile; more than half an hour, or perhaps not so long; but he did not go far from our farm. He was trying to get away and they were trying to catch him; one coloured boy was about twenty yards off when father was stabbed.

At the foot of the depositions thus returned, was this memorandum:

"Prisoner committed, and evidence certified to His Excellency the Governor General." (a)

(Signed,) W. H. MATHEWS, J. P.

Upon this evidence the following warrant of commitment issued.

PROVINCE OF CANADA, } To all or any of the constables or  
COUNTY OF BRANT. } other peace officers in the county  
of Brant, and to the keeper of the common gaol of the  
county of Brant, at Brantford, in the said county of Brant.

Whereas John Anderson was this day charged before us, two of Her Majesty's justices of the peace in and for the said county of Brant, on the oath of William C. Baker, of Howard county, Missouri, and others, for that he, the said John Anderson, did, in Howard county, in the State of Missouri, on the 28th day of September, 1853, wilfully, maliciously, and feloniously stab and kill one Seneca T. P. Diggs, of Howard county. These are therefore to command you, the said constables or peace officers, or any of you, to take the said John Anderson, and safely him convey to the common gaol at Brantford aforesaid, and there deliver him to the keeper thereof, together with this precept.

And I do hereby command you, the said keeper of the said common gaol, to receive the said John Anderson into your custody in the said common gaol, and there safely keep, until he shall be delivered by due course of law.

Given under my hand and seal this 28th day of September, in the year of Lord, 1860, at Brantford, in the county of Brant aforesaid.

(Signed,) W. H. MATHEWS, J. P.  
HENRY YARDINGTON, J. P.  
JAMES LANGTRY, J. P.

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(a) Note by Reporter.—This memorandum did not appear with the copy of evidence certified by the justice of the peace for prisoner's counsel, which copy was that given to Mr. Justice McLean, and on which his judgment was in part founded. The absence of it will account for some remarks in the judgment made upon the supposed want of any proof that the evidence had been so certified.

*Freeman*, Q. C., (having read the evidence as above given,) moved that the prisoner should be discharged.

The only crime for which the prisoner can be detained under the depositions is that of murder, and he has been arrested with a view of having him surrendered to the United States under the extradition treaty. He should be discharged therefore unless the depositions are sufficient to sustain the charge of murder, or at least are sufficient to put him upon his trial for that crime, according to the law of this province, if the alleged criminal act had been committed herein. Whether homicide is murder, manslaughter, or a justifiable killing, must depend upon the circumstances and provocation under which the act was committed, and it is only necessary to shew that the killing of Diggs by the prisoner was not murder.

The depositions shew that the prisoner was suspected by Diggs of being a runaway slave, and Diggs ordered his four slaves to capture him, Diggs' object being to return the prisoner to McDonald, his master, in slavery. This the prisoner knew, and he fled to prevent his capture. In his flight the prisoner ran in a circle, and the four slaves, being urged on by Diggs continually hallooing to them, chased him for nearly an hour. Diggs' slaves while running halloed back to their master, which gave him to understand the direction of the prisoner's flight, and for the purpose of intercepting it and seizing hold of the prisoner Diggs with his son ran across and met the prisoner. Each witness speaks of them, the prisoner and Diggs, as meeting and coming in contact, in the way I have mentioned. At this time the slaves in pursuit were about twenty yards behind. As they came in contact the prisoner stabbed Diggs in the breast. Diggs turned to run away, and *as he turned* he caught his foot in a vine and fell; and after he had fallen, as two witnesses state, or when he was in the act of falling, or had fallen, as he related the circumstances to his son on his death bed, the prisoner stabbed him again in the back. It would appear therefore that the second blow followed the first instantly, and while the parties were together. The witnesses say that Diggs turned to run away, but there was no act of flight, no proof of a step having been taken in flight; for

Benjamin F. Diggs says, "Father was first stabbed in the breast; after that father *turned to run* away, and hung his foot in some vines and fell; the man then stabbed him in back;" and his other son, Thomas D. Diggs, says, that his father on his death bed talked to him about the "cutting affair," and upon this point his father said "the blow" (meaning the first blow) "stunned him; he *turned to leave*, and his feet caught in something, and while he was in the act of falling, or had fallen, he stabbed him again in the back." Nor is there any evidence to shew that the prisoner had reason to know that he turned to run away; no words were spoken.

According to our laws any attempt to deprive another of his liberty, though only for a moment, without legal process, would be illegal, and might be legally resisted; but a man would not be justified in slaying his assailant on so slight a provocation, nor do I contend that such a killing would not justly expose the offender to a trial for murder. But, on the other hand, when we consider the condition of the slave: that his state is one of captivity for life: that he is deprived of the right of dominion over himself: that he can own nothing: cannot defend himself against insult or injury: can have no social enjoyment: that neither his wife nor children are his own; and that in fact Diggs' object was to reduce the prisoner to a condition worse than that of a brute—I think it cannot be doubted that according to our law the homicide was justifiable, and in any view of the matter it would not amount to murder; and this is all that it is necessary for me to shew.

The next point is whether the prisoner's acts are to be judged by our law or the law of Missouri? The treaty, as recited in the Consolidated Statutes of Canada, is as follows: Whereas, &c., "it was agreed that Her Majesty and the United States should, upon mutual requisitions by them or their ministers, officers or authorities respectively made, deliver up to justice all persons who being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek an asylum or should be found within the territories of the other; provided,



that this should only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed." And the first section of our act, passed for the purpose of carrying this treaty into effect in Canada, in pursuance of the fifth section of the imperial act, passed to give effect to the treaty in England and the Colonies, declares that, "Upon complaint made under oath or affirmation, charging any person found within the limits of this province with having committed, within the jurisdiction of the United States of America, or of any of such states, any of the crimes enumerated, or provided for by the said treaty, any of the judges of Her Majesty's superior courts in this province, or any of Her Majesty's justices of the peace in the same, may issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or such justice of the peace, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge, according to the laws of this province, if the offence alleged had been committed herein, he shall certify the same, together with a copy of all the testimony taken before him, to the Governor, that a warrant may issue, upon the requisition of the proper authorities of the United States, or of any of such states, for the surrender of such person, according to the stipulation of the said treaty."

The second section of our act provides, that upon the hearing upon the return of the warrant of arrest, "copies of the depositions upon which an original warrant in any of the said United States may have been granted, certified under the hand of the person or persons issuing such warrant, or under the hand of the officer or person having the legal custody thereof, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

The fourth section gives to the accused the right to the writ of *Habeas Corpus* for his discharge, if he shall be detained in gaol in this province more than two months. This provision was made to protect the accused against an illegal detention,

and does not expressly or impliedly affect the prisoner's common law right to the writ, to enquire into the legality of his commitment in the first instance.

The whole question turns, I apprehend, upon the force and meaning of the proviso in the treaty, declaring that no one shall be surrendered unless "upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed;" and of the words in the first section of our act; "and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge, according to the laws of this province, if the offence alleged had been committed herein." These words are restrictive, and were evidently intended to be most significant.

It was suggested by the counsel who appeared for the claimants before the magistrate, that these words referred to the character of the evidence, and the rules by which the evidence was to be received, and not to the law of the crime or the criminality of the accused. This view cannot be sustained, because the second section of the act provides for the reception of evidence contrary to the laws and rules of evidence then existing in this province, and would effect a most material alteration in the treaty, instead of being an act to carry the provisions of the treaty into effect. And, moreover, the second section is not expressed as making any alteration in the treaty stipulations, as it would have been if it were intended to have that operation.

And, again, to give such meaning to those words would be rendering them useless, because our courts could only receive proof of the criminality of the accused according to our law and rules of evidence if these words had been entirely omitted, and the rules of construction require that some effect should be given to every part of an agreement. I submit that they were intended to mean just what they express; namely, that the "evidence of criminality," (or facts proved,) "must be sufficient to sustain the charge according to the laws of this province," (or such as our laws

would require it to be to sustain the charge,) "if the offence alleged had been committed herein," and the prisoner were to be here tried.

Besides, this construction is consistent with the acts and policy of the British Government, in relation to the natural rights of man, and particularly in reference to slavery. I may refer to the philanthropy of the British nation in the expenditure of one hundred millions of dollars for the emancipation of the slaves in her colonies, and to her heavy annual expense, before and since, in fitting out and sustaining cruisers to suppress the traffic at sea, and using her position and power to draw other nations into treaties with her for the same purpose, as affording conclusive evidence that she never could have intended to aid the master by supporting and maintaining his authority over his slaves, as being the proper relation between master and man.

But the history of the *Creole* case is more immediately in point, and was as follows: it will be found in the proceedings of the House of Lords, of the 14th of February, 1842. A vessel called the *Creole* left Hampden, in Virginia, loaded with tobacco and slaves, for New Orleans, on the 30th of October, 1841. The slaves rose on the officers, crew, and passengers, killing one passenger, and severely wounding others and part of the crew, and compelled the first mate to navigate the vessel to Nassau, in New Providence, a British Island. The surrender of these slaves was demanded by the American Government, on the ground that they were murderers and pirates, but this demand was refused, and the slaves were set at liberty. In the House of Lords, Lord Denman, giving his opinion upon the demand, said, "It was desirable, as his learned friend Lord Brougham had said, that a power should be established by which one country might be enabled to seize criminals for crime committed in others, but such a right must be founded on the supposition that the laws of all countries were reasonable and just, for no country was entitled to enforce a law which was believed to be founded in injustice. Till the laws in each country were such as a christian country ought to adopt they could not be enforced by one another. He could not help



expressing his wish that the distinguished persons who were at the heads of the jurisprudence of America might be able to bring the law of America into this state. Yet he could not but observe that the existence of the slave trade, and above all the encouragement to that trade, formed an insuperable difficulty to our Government entering into any such treaty, or persuading the legislature to consent to such a law. Any state of the law in such a country might involve a decision upon a question of slavery, and he was sure the government of England would never give any encouragement, directly or indirectly, to slavery, still less would they act as policemen or gaolers to enforce the rights of the master over the slave. They would rather rejoice that two hundred individuals who had been reduced to a state of slavery had restored themselves to liberty."

This language fully expresses the British mind on this subject, and one may reasonably urge, as doubtless it was so, that it was in this mind that the treaty was conceived and entered into. The leading and most important principle announced by Lord Denman is that no nation "is entitled to enforce a law of another country which was believed to be founded in injustice," such as the law of slavery. The construction contended for by the claimants of this prisoner would be enforcing this unjust law; on the other hand, the one contended for by the prisoner would not enforce it. It cannot therefore with reason be said that the British Government intended to treat such acts as those charged against the prisoner as criminal; and this is the first point to be considered in the construction of every agreement, namely, the intention of the parties.

The next point is whether the language used necessarily leads one irresistibly to the conclusion that an opposite intention is expressed, for where man's natural rights are taken away by a law the intention to do so must be expressed with irresistible clearness. Every inhabitant, though not a subject, owes obedience to the laws of the country in which he resides, and as a correlative the laws of the country owe him protection, both in person, liberty, and property. Besides, this treaty applies to the subjects of each country sojourn-

ing or residing within the territory of the other. Coloured subjects of this country travelling through Missouri might be pursued and arrested by any white man who might suspect them of being runaway slaves; and every coloured man there is presumed to be a slave, and if he cannot produce a pass the presumption arises that he is a runaway, and he may be arrested and imprisoned without having any redress, according to the laws proved by Mr. Halliday. It never could have been the intention of Great Britain to place her subjects in this position.

The evil to be remedied was the want of power in the government to surrender such criminals, being high offenders, as by their acts had shewn themselves to be dangerous members of society. The remarks of Lords Brougham, Campbell, Cottenham, and the Lord Chancellor, in the *Creole* case, shew this, while those of Lord Denman shew that any act of a slave in asserting his liberty would not be considered an offence to be punished, but rather an act to be approved. The object to be obtained, or, as legal writers say, the evil to be cured, was certainly not that slaves committed acts of violence in asserting their freedom. The position of the slave was in the mind of the government at the time the treaty was made. The proceedings of the British and Foreign Anti-Slavery Society, as well as the *Creole* case, shew this; and it must be apparent, if the treaty were intended to impose the obligation to surrender criminals according to the laws of the United States, that we would be holding as criminal the very acts which according to our laws are not only justifiable, but praiseworthy. Besides, there is no difference in principle between the slave trade at sea, and the slave trade on land—between purchasing grown up human beings from the King of Dahomey, for the yoke, and breeding young ones, as cattle are bred, for the same purpose. Of the two, the latter would to many appear the more inhuman practice, and one cannot believe that Great Britain would knowingly have committed the inconsistency of urging upon the United States the alliance contained in the eighth article of our treaty, by which that country agreed to co-operate with Great Britain on the coast of

Africa for the suppression of slavery, and at the same time assuming to support the same traffic in the United States. This no one can believe.

Our laws, and not the laws of Missouri, should be applied to the acts charged against the accused, as criminal, and the justice or the judge should ask himself whether, if all this had occurred in Canada, (that is, if the whole transaction had taken place here,) it would according to our laws be sufficient to sustain the charge of murder, or whatever crime was imputed against the prisoner. If this be the proper view to take, then the prisoner must be discharged.

It may be said that according to our laws it is murder in any one to resist unto the death any one using lawful authority, and that Diggs was exercising lawful authority according to the laws of Missouri. The obvious answer to this is, that according to our laws Diggs' acts were unlawful, and his acts, as well as the prisoner's, must be judged by our laws.

Under the treaty no fugitive can be demanded unless he has committed one of the crimes enumerated according to the laws of the United States, but this is not enough, for the proviso requires that the evidence of criminality should be such as, according to the laws of the place where he is found, would shew him to be guilty of the same crime if the acts complained of had been there committed. Thus his acts must be criminal according to the laws, or the spirit of the laws, of both countries. This construction would secure mutuality between the contracting countries, and the surrender of all criminals that should be surrendered, and proper protection to all against the unjust laws prevailing in either country, for no government should surrender or submit a subject to the laws of another country, who had not committed an act which exposed him to punishment if it had been committed in his own country; and residents or sojourners are entitled to the same protection from the laws of the country in which they are found as subjects.

I do not contend that the laws of both countries should be literally the same, but merely that they must be alike in



spirit, and directed to such subjects of legislation as according to the well understood policy of both governments were objects of municipal arrangement; and human bondage was not such a subject in this country.

It appears to me, in conclusion, that the words in the treaty and the act of parliament referring to the laws of Canada, were inserted to prevent our being obliged to surrender a fugitive on the ground that he had committed the crime charged against him in the United States, regardless of the light in which his acts would have been viewed in our country; and that these words were used to avoid the difficulty which Lord *Denman* foresaw in entering into such a treaty as this with the United States, in consequence of the existence of the institution of slavery there.

*Eccles*, Q. C., for the Crown. There is no doubt that if the prisoner does not come within the strict letter of the treaty he must be discharged, for there is no pretence that he is held in custody on any charge which could be tried in this country; he is detained only until the government decide whether he shall be surrendered to the American authorities in compliance with their requisition. The single question to be determined therefore is, whether the case comes within the treaty. That he has committed homicide there can be no question; it is in fact admitted, but it is said to have been committed under circumstances which either justified it altogether, or reduced the crime to manslaughter; and in either case it has been properly argued that he should be discharged, because being held only under the treaty he cannot be detained to answer a crime not within the meaning of it.

The ground on which it is contended that the act was justifiable, is that the prisoner was pursued by a number of persons, of whom the deceased was one, with a view of depriving him of his liberty, and that if this had occurred in this province, without any further fact appearing, the prisoner would have been justified in what he did. No doubt, if a man is pursued here by a number of persons *without authority*, in order to deprive him of his liberty, he may

use such force as is necessary to defeat their object. That is clear ; but in this case the deceased *had authority*, and upon that distinction the whole question turns. The persons who prefer the charge admit that the deceased and others attempted to deprive the prisoner of his liberty because he was a slave, and was attempting to escape ; or rather, perhaps, because he was a slave and was found at a distance from his master's house without a pass, and by the law of the state they were justified in arresting and returning him to his master. It is not denied on the part of the prisoner that the deceased and those assisting him were acting strictly within the law of Missouri, but it is contended that in this case the common principle of law, that resistance to legal authority is illegal, and that killing in such an attempt is necessarily murder, does not apply, because the law under which the deceased acted was a law enforcing slavery, which this court will not take cognizance of.

Upon that point we dissent from the argument for the prisoner. No doubt it is contrary to the spirit of every law of Great Britain and of this country, that any thing savouring of slavery should be countenanced in the slightest degree, or that the least assistance should be lent towards forwarding the views or objects of such an institution, but we must be governed by the words of the treaty, which is to be construed as a contract, and we cannot add exceptions or provisions which it does not contain.

The law of Missouri will be looked at but for one purpose. It would be impossible to determine whether a person has been guilty of a crime in the United States without first looking at the laws of the state where it is said to have been committed. If this case had not involved any question of slavery, but the prisoner had been charged with an offence against a statute of the state, which was not by statute an offence here, the enactment must have been looked at to determine whether the offence had really been committed. The treaty could not mean that only crimes known to our laws were to be recognised, but it applies when the proof given here would, according to the laws of the foreign country, shew an offence within the terms of the treaty. If, for instance, a

person were charged with forgery under the provisions of an act in force in the foreign state, but not here, surely he would be within the treaty. This and similar examples that might be suggested shew that there must be some extraordinary distinction between the law under which the deceased acted and any other law, if his act can be held to be without the treaty and justifiable. The government, however, are anxious that he should have the benefit of any doubt, and they desire not to press the case against him in the slightest, but to obtain the opinion of the court as to the application of the treaty under all the circumstances.

*Robert A. Harrison*, on the same side. I agree with many of the propositions laid down by the counsel for the prisoner, but cannot go the entire length of his argument. The question for the determination of the court is not as to the interpretation to be given to the Canadian statute, but as to the interpretation of a treaty between two great and powerful nations.

The law of nature is the foundation of international law, and by the law of nature every man is entitled to absolute freedom and independence. But the moment man enters society he gives up a portion of his natural liberty in order to secure the enjoyment of the remainder.

No one state is bound by the local or municipal laws of another state, and especially if that local law be opposed to the law of nature or common law of nations. The law of slavery is, I admit, a local or municipal law, and for the purposes of this argument I admit that it is a law opposed to the law of nature. So far my learned friend Mr. Freeman and myself are agreed, but to make his argument effective he must shew that Anderson is claimed by the state of Missouri as a slave, and this is the point where we differ.

Anderson is not claimed by the state of Missouri as a slave, but as a fugitive from criminal justice, as a murderer according to the laws of that state, as a murderer within the intent and meaning of an existing treaty.

The question of slavery has nothing whatever to do with the discussion now before the court, however much it may



nfluence our feelings. In order calmly and temperately to discuss the questions raised, it is necessary as much as possible to subdue our feelings, so as to keep our judgment unimpaired and unaffected.

Though not free from doubt, the better opinion seems to be that the law of England does not recognise the obligation to surrender alien fugitives from foreign justice, in the absence of a treaty or statute providing for or authorising the same. Such is the opinion expressed by the late lamented Chief Justice *Macaulay*, in *Regina v. Tubbee*, (1 U. C. Prac. R. 102,) and such appears to be the conclusion at which several modern writers on international law have arrived.

Our first enquiry, therefore, is whether there is any treaty between Great Britain and the United States authorising the surrender of Anderson under the circumstances of this case. In the first place, there was Jay's Treaty during the late war, which ceased with the war. In the next place, there was the statute of Upper Canada, 3 W. IV., ch. 6, which is now repealed by statute 23 Vic., ch. 41. In the last place, there is now the Ashburton Treaty, and the Canadian statute, passed in 1849, to give effect to it.

The Ashburton Treaty was made in 1842. It is intitled, among other things, "For the giving up of criminals, fugitive from justice, *in certain cases*." It is not, it will be noticed, for the giving up of criminals in all cases, but only "in certain cases." By reading Article X., the cases in which criminals shall be given up are described and defined. That article is as follows:—"It is agreed that Her Britannic Majesty and the United States *shall*, upon mutual requisitions by them or their ministers, officers or authorities respectively made, deliver up to justice all persons who, *being charged* with the crime of *murder*, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, *committed within the jurisdiction of either*, shall seek an asylum, or shall be found *within the territories of the other*."

Crime is inseparable from locality, (per *Heath*, J., in *Mure v. Kaye*, 4 Taunt. 43.) Crime is an act of commis-

sion or omission as against the laws of some particular place. In judging of crime, reference must be made to the laws of the place where the act done or omitted is said to have been done or omitted, and this well understood rule of law is strictly observed in this treaty. But although crime is to be judged by the law of the place where the act was done or omitted, it does not follow that the fugitive carries with him the laws of evidence of that place. The treaty, however, is not silent on this important point.

It continues, "Provided that this shall only be done upon such *evidence* of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed." Though it may be proper to judge of crime by the law of the state where the act is done, it would not be reasonable to ask our tribunals, when investigating the facts, to see if the crime defined is made out, to receive the facts, or weigh them when received, according to the laws of that state; in other words, to investigate the facts according to the laws of evidence prevailing in the foreign state. When a clear idea of the crime according to the laws of the foreign state is obtained, the investigation of the facts, in order to see if they constitute that crime, must be according to the laws of the place "where the fugitive or person so charged shall be found." Does this proviso mean more? It would seem not.

It is contended by the counsel for the prisoner that unless the act done in the foreign state, and which is declared a crime by the laws of that state, is also a crime according to our laws, the case is not within the treaty. This, in the extent to which it is urged, is not only a construction at variance with the language of the treaty, and at variance with the rules for the construction of treaties, but one which if allowed would have the effect of rendering this particular treaty in most cases of crime wholly inoperative.

One rule for the construction of treaties is as follows:—  
 "Every thing that tends to the *common* advantage in conventions, or that has a tendency to place the contracting parties

on a footing of equality, is favourable. (Vattel on the Law of Nations, 243.) To this let us add a rule of law common to the United States and Great Britain, as follows:—"Where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing, and killed, *it will be murder*. (Russell on Crimes, vol. i., 535, 7th American edition, from 3rd London edition.)

Diggs was killed by Anderson. Was Diggs at the time of the fatal wounds a person having authority to arrest, using the proper means for that purpose? If we look at the law of Missouri, we find that Diggs had authority to arrest, and if we look at the evidence we find that he was using the proper means for the purpose. The fact of the killing under these circumstances is fully established by the evidence taken in Brantford, sufficient according to the laws of Canada. So far the offence made out (killing when in lawful custody) is an offence *common* to both countries, and the argument of the counsel for the prisoner as to the proviso is satisfied. But he says we cannot look at the laws of Missouri, or, if we do look at it, we must at once shut our eyes and forget all about it. Why? Because it is a slave law. This position is neither warranted independently of the treaty, nor supported by the treaty. It is true that Great Britain, so far as her subjects are concerned, is not bound by the slave laws of a foreign power, but to say that she cannot for any purpose *look at* such a law is to say what is unsupported by authority. *Madrazo v. Willes*, 3 B. & Al. 353; *The Diana*, 1 Dods. Adm. Cas. 95; *Le Louis*, 2 Ib. 210; *Buron v. Denman*, 2 Ex. 167. (a)

But I maintain here that we not only can look at the law of Missouri, but that under the treaty we are *bound* to do so. The treaty must be so read as to secure mutuality. Unless the *lex loci*, or law of the place, in the case of crime is under this treaty to be observed, there can be no mutuality. We must view the treaty not only in a United States point of view, but also in a Canadian point of view. We have statutes that under certain restrictions permit imprisonment

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(a) Mr. *Harrison* on a later day referred the court to *Santos v. Illidge* 3 L. T. Rep. N. S., 155, reported after the argument of this case.



for debt. Suppose a debtor so imprisoned to kill his gaoler, and flee to one of the United States where there is no such law. Are we to be told that the fugitive cannot be surrendered because they have no such statutes as ours? To kill when in lawful custody is the crime of murder in each country. We have no right to go into the question of the laws which make that custody lawful. It is enough under the treaty if the fact of lawful custody is established. If Anderson had been conveyed by Diggs to a gaol, and to make good his escape had killed the gaoler, we should have been bound to surrender him. There is no difference between the case supposed and the case as it stands. Anderson in the custody of Diggs was, according to the laws of Missouri, as much in lawful custody as if he had been in the custody of a gaoler of that state.

Besides, it is no part of our duty under the treaty to *try* the charge. The duty of our officers is simply ministerial, not judicial. The treaty continues, "And the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the *evidence* of criminality may be *heard* and *considered*; and if, on such hearing, the *evidence* be deemed sufficient to sustain the charge, *it shall be the duty* of the examining judge or magistrate to certify the same to the proper executive authority, *that a warrant may issue for the surrender of such fugitive.*" Our Consolidated Statute of Canada, ch. 89, is to the same effect. Indeed by sec. 3 of the act, the construction for which I contend is made still more evident. It enacts that "The Governor upon a requisition made, &c., may, by warrant, &c., order the person so committed to be delivered to the person or persons authorised to receive such person, &c., *to be tried for the crime of which such person stands accused,*" &c. It is the duty of our magistrates to investigate, not to try and determine. Their powers are simply ministerial. The trial must take place in Missouri, *where the alleged crime was committed.* The

magistrates here have nothing to do with the probability or improbability of an unfair trial there, or the fact that Anderson, even if acquitted, will be restored to bondage. The treaty does not give to us, or to our magistrates, the right to say either that we disapprove of the law of Missouri, or that there is no chance of a slave receiving a fair trial in that state. Probably, if this case had occurred before the Ashburton Treaty, some provision might have been made to exempt slaves from the operation of that treaty, but we have to deal with the treaty as we find it, not as we think it ought to be, or would be if reconstructed. We find that no exemption is made in favour of the slave, and that if charged with crime he must be treated like any other person, bond or free, similarly charged, regardless of what may or may not be done to him when surrendered.

This brings us to the real question in this case, whether there is evidence sufficient according to the laws of Canada to commit Anderson for trial in the state of Missouri, on a charge of murder committed in that state? This a question of evidence, not of law. Killing is *primâ facie* murder. It is proved that Anderson killed Diggs. *Primâ facie* Anderson is a murderer. He however pleads in extenuation that he killed Diggs in the frenzy of the moment, when endeavouring to make his escape from slavery. The question whether he did so in the state of frenzy alleged, is a question for the jury to determine. It may be that a jury, considering all the circumstances of the case, would acquit of the major offence of murder, and find guilty of the minor offence of manslaughter. To do this is the peculiar province of a jury. The investigating magistrate has no power either to try the fact or to anticipate the verdict of the jury.

There is still another view which I desire to submit to the consideration of the court. Suppose we concede, for the sake of argument, what the learned counsel for the prisoner contends, that we have no right to look at the law of Missouri. How stands our law? Grant that Diggs had no authority to arrest. How stands the evidence? I am not aware of any rule of law which allows a man to use greater force in defence of his liberty than of

his life. Liberty is precious, but life is not less so. By our law a man may in defence of his life oppose force to force, using no greater force than requisite to effect his object. Look at the facts. Anderson was a more powerful man than Diggs. Diggs had only a paw-paw stick, or a small light cane; Anderson had a knife. Diggs uses the paw-paw stick; Anderson uses the knife. The paw-paw stick was used only in the defensive; the knife was used in the offensive. Anderson stabbed Diggs in the breast, and then Diggs turned to flee. He had turned, and in his flight fell. As he lay on his face Anderson *again* stabbed him—this time in the back. Surely here, even according to our laws, if Diggs were in Upper Canada endeavouring without authority to arrest Anderson, there would be an *excess* of force. No magistrate could take upon himself to say that the force used was excusable, and no court of law would say that it was justifiable.

I need not further take up the time of the court in referring to the evidence. It is all before the court, and will before any decision is given be carefully and anxiously read. As already mentioned, it does seem to me that the question for the decision of the court is more one of evidence than of law.

Every British subject abhors slavery, but every British subject should be a respecter of British laws. Law is the foundation of liberty. If our laws oblige us to surrender Anderson, it is our duty to surrender him rather than violate the laws.

ROBINSON, C. J.—On the 20th of November, 1860, a writ of *Habeas Corpus* was granted, returnable in the Queen's Bench, to bring up the body of John Anderson, detained in the custody of the sheriff of the county of Brant, with the cause of his detention.

To this writ the sheriff returned that the prisoner was in his custody, upon a warrant in these words. (The Chief Justice here read the warrant of commitment, given before, page 133.)

The complaint on which this warrant issued was made by one James A. Gunning, of the city of Detroit, in the State of Michigan, and was sworn in the county of Brant, before W. Mathews, a justice of the peace for that county.



It stated that John Anderson did, on the 28th of September, 1853, wilfully, deliberately, and maliciously murder one Seneca T. P. Diggs, in the county of Howard, in the State of Missouri, one of the United States of America, "all of which this deponent doth verily believe."

This last line seems like a qualification of the positive statement with which the information commenced, though it is often added in depositions even when the deponent speaks of conclusions which he has been led to form from facts within his personal knowledge. If this deponent, however, was not an eye-witness to any act tending to prove Anderson's guilt, it would not follow that his complaint could not be received as ground for bringing the party before the justice, and detaining him a reasonable time until the proper evidence could be produced. There may have been but one witness to the crime in any such case, and in many there may be no witness surviving; and if a fugitive offender from abroad, or one of our own country, could not be arrested and held in custody on such an information as this, and in many cases without a warrant, until the more positive and direct testimony can be produced, the chance would be but small of arresting the offender, and very desperate crimes would often go unpunished. When some great crime, and especially a murder, has been committed, we see hand-bills with minute descriptions of the person known or suspected to be guilty, dispersed through our own and the neighbouring country, and in many cases it is by peace-officers and others venturing to act upon such notices that the person is stopped in his flight, sometimes with a warrant and sometimes without. The person or persons who have a knowledge of the facts are often not in a condition to make pursuit themselves, and at any rate they could not be every where at one time, nor could informations sworn to by them be so widely distributed as to be every where at hand, ready to meet the offender. And even where they could be produced at the moment, still the offender would be in many cases out of reach before a warrant could be framed upon them.

No objection, I think, was taken to the information

sworn to by Mr. Gunning, and when the justices had the prisoner before them, and heard the testimony that was afterwards produced, they could not properly decline to act upon it.

Upon a *certiorari* directed to the justices of the peace who made the warrant of commitment, the evidence was returned which they had received in support of the charge; and one of the justices has returned that the prisoner was committed, and the evidence certified to the Governor; and a copy of the testimony is also sent, which is in substance this:—

The prisoner, John Anderson, in and before the year 1844, and from that time till 1853, was living with one Moses Burton, whose slave he was, in the county of Howard, in the State of Missouri, one of the United States of America.

In 1853, before September, Burton *transferred*—that is, as I infer from the evidence, sold—Anderson to one McDonald, who lived in Saline county, in the said state of Missouri, about thirty-two miles distance from the residence of Burton. Anderson had a wife who lived with one Samuel Brown, in Howard county, about two miles from Burton's.

In September, 1853, Anderson had been seen by several parties in the neighbourhood of Brown's, and Brown's farm and McDonald's being on opposite sides of the river, and so distant from each other, it was suspected, and was rumoured in the vicinity, that Anderson had run away from his master, McDonald; and in September, 1853, a day or two before his meeting with the deceased, Seneca T. P. Diggs, he had been seen on Brown's farm by two persons, who pursued him in order to take him up and deliver him to McDonald, from whom it was supposed he had escaped. He ran from them, and had been about three weeks from his master, McDonald, when about the 28th day of September, the deceased, Diggs, who lived about six miles from Brown's, having been at work in his barn with some of his negroes, was going from thence across his field to his dwelling-house, about noon, to get dinner. He had four of his negroes with him, and on their way to the house he met Anderson, who asked him if

he could tell him where one Charles Givens lived. This Charles Givens lived on the next farm to the deceased, Diggs; and in answer to Diggs' enquiry of Anderson where he was going, and to whom he belonged, Anderson told him that he was going to Givens to get him to buy him. He belonged, he said, to a man on the other side of the river, named McDonald, and he added that he did not want to live on the other side of the river because his wife was living at Brown's, on the same side as Diggs lived, and about six miles from his farm and Givens'.

Diggs then asked him if he had a pass. He said he had not. Diggs remarked that that looked suspicious, as he was so far from McDonald's, and that he must be a run-away. He told Anderson also that he could not allow him to go without a pass, for that he would be himself responsible; and he told Anderson to go with him to his house and get his dinner, and that he would go with him to Givens and see about the matter. They were at that time going towards the house. Anderson was going quietly along the road, and as they came near to Diggs' house, he suddenly started off and ran away. Diggs called to his four negroes to run after him, telling them that if they could catch him they should have the reward.

Diggs had a son of his with him, a child about eight years of age, and could not keep up with the negroes while they were pursuing Anderson, but followed them. Anderson, while he was running from the negroes, took out a knife and called out that he would kill them if they came near him. The negroes had continued chasing him round for some time in a kind of circle, when Diggs having gone across the circle saw Anderson not far from him, on the other side of a fence, and with his little boy got over the fence, and continued the pursuit, having a small stick in his hand. Anderson, when Diggs had got about six yards from the fence, turned upon him, having an open knife in his hand, and ran at him. Diggs struck at him with the stick, which caught in some bushes and broke; and then Anderson stabbed Diggs with his knife (a long dirk-knife) in the breast. Diggs turned to run from him, and caught his foot in a vine and fell, when



Anderson went up to him, and stabbed him in the back and ran off. Diggs got up and walked fifteen or twenty yards, and then fell, being unable to get farther. At this time one of Diggs' negroes was about twenty yards from them; the others were at a distance, and for all that appears may not have been in sight. The negroes continued to pursue Anderson, but he escaped from them, and found his way to Upper Canada, where he was recognised and apprehended in the spring of the year 1860.

The place where Diggs was stabbed was about a mile distant from his house. His little boy remained with him an hour or more, till one of the negroes came with a doctor named Crewse, who lived about half a mile from the spot, and Diggs was removed on a sled to the doctor's house, where he remained till he died, two or three weeks afterwards, or perhaps rather longer, for in regard to the time there seems to be some discrepancy in the evidence.

Two of Diggs' sons were examined before the magistrates at Brantford, in this province, to whom the complaint was made; and the deposition of one of the negroes, who was near enough to see and did see Anderson stab the deceased, was by consent of the prisoner's counsel allowed to be read.

One of the sons, now fifteen years of age, is the same boy who in 1853 was with his father when he received his wounds; the other son, ten years older, saw nothing of the occurrence, but proved the account given to him by his father, two days before he died, when he had no hope that he could recover. Another witness, William C. Baker, gave evidence of the same description from the account which he received from Diggs, while he was lying at Dr. Crewse's.

There is little variation in the accounts, and the testimony of the witnesses has the appearance of being given fairly. The prisoner, Anderson, admitted after his arrest that he had cut a man in attempting to escape from slavery, but did not believe that he had killed him. He desired to address this court when brought before it upon this writ, and said the same thing in substance.

There seems to be no room for doubt either as to the facts of the case, in any important particular, or as to the spirit in

which Diggs and Anderson acted from the moment they met on that day in September which proved fatal to Diggs.

In the arguments addressed to us by Anderson, through his counsel, and in some observations which he made himself, it is clear that he desires to rest his defence upon the ground that in stabbing Diggs, and in his whole conduct on that day, from the time they met, he was actuated solely by the desire to gain his freedom by escaping from slavery. This, it was urged, was the motive that prompted him throughout; and we are told that although he did profess to Diggs that he was anxious merely to change his master for the reasons which he gave, and had come to that part of the state for the purpose of endeavoring to induce Givens to buy him, yet that was merely a pretence put forward to lull suspicion and to cover his real design, for that he had in fact escaped from his master, McDonald, and was bent on making his way out of the state, and had come to Howard county for the purpose of communicating with his wife, and arranging with her how she could follow him to Canada; and it was asserted in argument, in corroboration of this, (though I see nothing of that in the evidence before the committing magistrates,) that his wife did actually make her escape about the same time, and got to Detroit before himself.

On the other hand, in the evidence brought forward to sustain the charge, it is plainly and consistently stated that Diggs acted entirely from the motive of preventing the escape of Anderson, and with a view to restore him as a slave to his master, McDonald.

They seem to have been strangers to each other up to that day; and Diggs, according to the evidence, acted not from any knowledge he had that Anderson was a slave, but from suspicion, strengthened by the fact that he had admitted that he had no pass, and that McDonald, who lived twenty or thirty miles off, was his owner.

The witness Baker, speaking from Diggs' statements, made to him while Diggs was lying mortally wounded and without hope of recovery, says:—"It was about dinner-time when Diggs first saw Anderson; he asked him to take din-

ner at his house, when Anderson broke away from him. Diggs was trying to stop him"—that is, as Baker explains, "he was trying to stop him from running away from his master, McDonald."

"Diggs told him," he says, (that is told Anderson, as I understand the evidence,) "that the law of the state compelled him to stop him if he had no pass. Diggs called to his black boys to catch him, and they started after him. There were three, or perhaps more black boys. Diggs was going to stop him, to return him to his master, McDonald, in slavery. It was in that pursuit that Diggs was stabbed, and got his death blow. I did not understand from Diggs that it was to do Jack any harm they tried to catch him, but merely to retain him." Again, Baker says:—"As they were making a circle Diggs was getting over a fence. Jack was coming towards him, and he (Diggs) was going to take hold of him to stop him. Jack was coming towards him, and tried to stop him, and he, Diggs, was going to take hold of him to stop him. Jack was coming towards him and stabbed him. As Diggs got over the fence they came in contact, and he received the stab. Diggs had gone to the fence to stop him, so he said to me."

The youngest son of Diggs, who was then with his father, says: "I was with father when he was stabbed, about five or six yards from him. He was in pursuit of the negro when he was stabbed. I was with father when he first started in pursuit of him. Other parties, say four black boys of my father, were following up." And he elsewhere explains that there were two men and two boys, from 17 to 19 years of age; and they heard it said among them that the strange black man they were pursuing was a runaway. "Father told them," he says, "to run after him. Father wanted to give him back to McDonald. He tried to get away, so that father could not deliver him to his master. Father also ran after him. I don't remember if he halloed, but he went after him. When the negro and he met, I did not hear any words pass. Father had a little stick in his hand. The negro ran at him with an open knife drawn in his hand. It was a paw-paw stick my father had. My father struck at



him with the stick after the negro had run at him with the open knife. The stick hung in some bushes and broke. The negro then stabbed father. Father raised the stick to keep the negro from cutting him with the knife as he ran at him. He was trying to get away and they trying to catch him. One coloured boy was about twenty yards off when father was stabbed."

Thomas Diggs, the other son of the deceased, was from home at the time of this occurrence, and saw nothing of it, but he speaks from the account which his father gave him of it when he was near dying, and as this witness was then ten years older than his younger brother, his account of what Diggs said when lying *in extremis* may be more safely relied on. This is his account of his father's statement of what took place after Anderson broke from them in walking towards the house:—"All at once he started off and ran. He (that is Diggs) said he told his negroes to catch him. They started after him, and he went with my brother who was not able to go so fast, and he stayed with him. After they had run around for some time the negro met him. The negro ran at him and stabbed him. He had a little stick in his hand, and as the negro ran at him he struck at him. The negro cut him a little on the wrist; then he stabbed him in his breast. The blow stunned him; he turned to leave, and his feet caught in something, and while he was in the act of falling, or had fallen, he stabbed him again in the back. The negro then immediately ran. The paw-paw is a very light wood; it never grows large. The one my father had was small. My father was a delicate man, thin and small. His height was six feet. He was slight, spare-made. He would not be able to cope with the prisoner; his health was not good. They considered the negro a runaway. My father was about thirty miles from McDonald's as I have heard. He did not live in the same county with father. I suppose my father wanted to catch the negro. I would suppose he wanted to return him to the owner. He was a slave, I have no doubt. Prisoner is about five feet eight or nine inches, his weight is about 160 or 170 pounds. My father's usual weight was about 135 or 140 pounds. When

the negro ran at my father he had the knife drawn in his hand."

That slave of Diggs, who was one of the party pursuing, and was near enough to him when he received his wound to see what passed, gives this account of the matter:—

"Next fall will be seven years ago, a negro man came to us, (that is, to my master Seneca T. P. Diggs, and the balance of the negroes in my master's field.) My master asked him if he had a pass. He said he had not. Master told him he could not let him go clear without a pass. He told my master that a man by the name of Burton raised him; that he now belonged to a man over the river by the name of McDonald: that he had a wife at Mr. Sam. Brown's, in Howard county, and that he was going to Mr. Givens to get Givens to buy him. Master told him that he could not let him go on that way without a pass; that he must go on up to the house, and eat dinner, and then he would go with him to Mr. Givens. He told master that his name was Jack. Just before we got to the house, the negro broke and ran. Master told us negroes to run after him. We ran after him. Master said we should have the reward if we could catch him. While we were running him, he took out his knife. We ran him around a good long while. Master would halloo all the time, and we would answer him. At last master met the negro, and I saw him cut master twice with a knife. I saw him when he ran at my master with the knife. While we were running after him he said he would kill us if we came near him. We ran after him some time after he had stabbed master, but could not catch him. The negro that killed my master was named Jack. He once belonged to Moses Burton, of Howard county, and had a wife at Sam. Brown's. I knew him and have seen him before the day he killed my master. This happened in Howard county, Missouri, in the United States of America, in the year 1853.

The testimony of this last witness was taken before a magistrate in the state of Missouri, and by consent of the prisoner's counsel was read in support of the charge. The statute, indeed, provides for a deposition taken in the foreign country being received in evidence at the investigation in

this province, when it has been authenticated in the manner directed, which this does not seem to have been, nor to have been made for the purpose of suing out a warrant in Missouri.

I have stated fully such portions of the several depositions as bear upon the conduct and motives of Diggs, and of the prisoner, as connected with the fact of the prisoner being a slave, and having escaped from his master, and of Diggs having attempted to arrest and detain him with a knowledge or upon his suspicion that this was the fact, and of his being engaged in that attempt when he received his wound.

These statements have been in substance given by me before, in the narrative of the occurrence, but to present them more clearly to view I have brought them together from the several depositions, extracting the statements in the words of the witnesses.

Then, as connected with that matter, and in order to prove in what situation, legally speaking, the facts placed the respective parties, a witness, I. A. Halliday, was examined, who deposed as follows:—

“I live in Howard county, state of Missouri; have been there since June, 1829. I was born there, and am a lawyer by profession. The first section, third article, of the act concerning slaves, Revised Statutes, 1845, of the state of Missouri, provides that any person may apprehend any negro or mulatto, being or suspected of being a runaway slave, and take him or her before justices of the peace. The second section provides that the justice shall take possession of, and deliver him or her to the owner. The 18th section of same article provides that any slave found to be more than twenty miles from his home, shall be declared to be a runaway. The 16th section provides that any one apprehending a runaway shall be paid the sum of five dollars, as a reward, if taken within the state, and fifty dollars if taken without the state, and ten cents for every mile of travel, in order to convey the runaway home to his master. This law was in force in 1853 and is still in force in substance. I heard of the death of Mr. Diggs at the time it took place, and have not heard of the death of any other person there since in



that way, nor for several years before. I don't know that I ever saw the prisoner till the other night. I may have seen him, but don't know that I have."

This being in substance the evidence that was before the committing magistrates at Brantford in this province, to sustain a charge against Anderson, the prisoner now before us, of having committed the offence of murder in the state of Missouri, it became their duty to consider it in connexion with our existing statute for the surrender of fugitive offenders from the United States of America.

Our former Fugitive Offenders' Act, 3 W. IV., ch. 6, has been repealed by our statute 23 Vic., ch. 41, and it can hardly be material to refer to it as an aid to the construction of the existing statute, because the latter act was passed for the purpose of giving effect to a treaty with a foreign government, and it is to that treaty we should rather look for an indication of what was most probably meant by any thing that may seem ambiguous in the language of the statute.

The matter now rests upon the Ashburton Treaty of the 9th of August, 1842, ratified 30th of October, 1842, and upon our statute, chapter 89 of the Consolidated Statutes of Canada, taken from 12 Vic., ch. 19.

The treaty provides that the governments of the two countries shall, upon mutual requisition, deliver up to justice persons charged with any of the crimes specified in the treaty, committed within the jurisdiction of either of the contracting parties, who should seek an asylum or be found within the territories of the other: "Provided that this shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive, or the person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed."

Our statute, ch. 89, for carrying into effect this treaty, provides, sec. 1, that upon complaint made under oath or affirmation, charging any person found within the limits of this province with having committed within the jurisdiction of the United States of America, or of any of such states, any

of the crimes enumerated in the treaty, “ any of the judges of any of Her Majesty’s superior courts in this province, or any of Her Majesty’s justices of the peace in the same, may issue his warrant for the apprehension of the person so charged, *that he may be brought before such judge or such justice of the peace, to the end that the evidence of criminality may be heard and considered ; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge according to the laws of this province if the offence alleged had been committed herein*, he shall certify the same, with a copy of all the testimony *taken before him*, to the Governor, that a warrant may issue, upon the requisition of the proper authorities of the United States, *or of any of such states*, for the surrender of such person, according to the stipulation of the said treaty ; and *the said judge, or justice of the peace shall* issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender be made, or until such person be discharged according to law.” Sec. 2.—Copies of the depositions on which the warrant has been granted in the United States, certified as the act directs, may be received on the hearing after arrest in this province, in evidence of the criminality of the person so apprehended. Sec. 3.—The Governor, upon such requisition by the authority of the United States, or of any state, *may* by warrant order the person *so committed* to be delivered to the person authorised to receive him on behalf of the United States, or of any of such states, to be tried for the crime, &c., *and such person shall be delivered up accordingly*. Sec. 4.—If any person committed under this act and treaty, to remain till delivered up in pursuance of a requisition, be not delivered up and conveyed out of this province within two months, then any of the judges having power to grant a *Habeas Corpus*, upon application made to him or them, by or on behalf of the person so committed, *and upon proof made to him or them that reasonable notice of the intention to make such application has been given to the Provincial Secretary*, may order the person so committed to be discharged out of custody, unless sufficient cause

shall be shewn to such judge or judges why such discharge should not be ordered.

Taking, then, this statute into consideration, together with the return made by the sheriff of the county of Brant to the writ of *Habeas Corpus*, stating the warrant under which he holds the prisoner in custody, and taking also the return made by the justices of the evidence upon which they issued that warrant, we have first to consider whether the warrant shews upon the face of it a legal cause of imprisonment.

I notice that it does not in terms state that the prisoner has been charged with *murder*, though the information and complaint on which the justices proceeded in the first instance to arrest the party did expressly contain a charge of that crime.

But the warrant of commitment does describe the charge in such terms as to shew clearly that what the law holds to be murder is the offence of which the prisoner was accused before the justices, and that they found the charge to be sufficiently sustained by the evidence to warrant the commitment.

The technical term "murder," which is indispensable in an indictment for that offence, ought to have been used, in order that it might be seen plainly, and not by inference merely, that the offence is one of those to which the treaty and the statute passed for giving effect to it directly apply.

Defects of that nature, however, in a warrant are not fatal, for there is not the same necessity for an adherence to technical terms in a warrant as in an indictment; and upon the return to a *Habeas Corpus* it is the foundation of the warrant to which the court looks, when that is before them upon a *certiorari*, rather than to the warrant itself. When a legal cause for the imprisonment appears upon the evidence, the ends of justice are not allowed to be defeated by a want of proper form in the warrant, but the court will rather see that the error is corrected.

The case of *The King v. Marks and others*, (3 East 157,) shews the principles on which the courts act in such cases, and this is matter of constant practice.

I notice also that the warrant of the justices does not follow



the words of the statute by committing the prisoner to gaol, "there to remain until he shall be surrendered (upon the requisition of the proper authorities) or until he shall be discharged according to law." The justices may have thought that those words in the end of the first clause of the statute, (Consol. Stats. C., ch. 89,) were inserted as the direction of the legislature, that the prisoner when imprisoned by the justices upon a charge of an offence committed in one of the United States, should in fact so remain imprisoned until surrendered or otherwise discharged by law, rather than that the legislature intended those words should all necessarily form a part of the warrant itself. Without them, however, all that appears on the face of the warrant is that the prisoner is placed in custody for an offence alleged to have been committed by him in a country over which our courts have no jurisdiction, and without any explanation of the authority for such commitment, or of the object of it.

This also is an imperfection in the warrant, which the court in any such case, having judicial knowledge of the grounds of the commitment, would be bound to see corrected rather than discharge the prisoner on account of it; if indeed the words which are in this warrant, "until he be discharged according to law," would not be sufficient in themselves, under the direction as to commitment given in the statute.

I mention these apparent irregularities chiefly in the hope that it may assist in leading to a more careful attention to form in similar cases that may arise.

No exception was taken to any defects in the warrant in the argument before us, probably because the learned counsel for the prisoner, who argued his case with much zeal and ability, was well aware that it would serve no purpose in the end to rest the application for his discharge upon them.

It was upon the question whether the commitment of the prisoner Anderson, with a view to his being surrendered under what is commonly called by us the Ashburton Treaty can be said to be warranted by the evidence, that the case was argued on both sides, and argued in that temperate and strictly professional spirit in which all such discussions for

judicial purposes should be conducted. Certainly the learned counsel who represented the government showed no wish that the court should, by any too rigorous construction of the treaty or of the statute, strain the law under which the surrender of the prisoner has been applied for.

I had some doubt during the argument whether it is competent for either of the superior courts of Upper Canada, or for a judge of any such court, to interpose in the case of an offender coming clearly within the terms of the Ashburton Treaty, after the judge or justice who has heard the evidence has determined that in his opinion it sustains the charge, and has certified to that effect to the Governor, and transmitted a copy of the testimony on which he has decided. Under the 4th section of the statute, where there has been a delay after the commitment in effecting the surrender, it is expressly provided that any of the judges of one of the superior courts may order the person to be discharged. But this is not an application made under that clause.

It is quite true that there can be nothing clearer than the authority of our superior courts of law to exercise the same control over inferior criminal courts, and over magistrates acting in the administration of the criminal law, as is exercised in England in like cases in the Court of Queen's Bench, and indeed without such controlling power the liberty of the subject would be most inadequately provided for; but the superintending authority which I now allude to is either given in particular cases by statute, or in other cases is exercised upon principles of the common law, in matters occurring in the ordinary administration of criminal justice, and arising within the ordinary reach of our laws.

The arrest of the person now before us for an offence committed in the state of Missouri, over which offence we have no jurisdiction, and his detention with a view to his being surrendered to the government of that state, is a proceeding apart from our ordinary jurisdiction, and rests wholly upon the provisions of a treaty between Great Britain and a foreign government, and of our statute passed in conformity with that treaty.

We see in that statute the powers which are given to us

and to other civil authorities for carrying out the treaty, and the provisions are precise in regard to the part which is to be taken by the different public authorities which are mentioned in it.

In the first place, a judge or justice of the peace, upon a proper complaint, is to issue his warrant for the apprehension of the alleged offender, and the judge or justice who has issued such warrant, is the person before whom the evidence in support of the charge must afterwards be heard, and he must determine upon its sufficiency, and must certify to the governor that it is sufficient, if he finds it to be so, sending at the same time a copy of all the testimony. And this the act says is to be done, "that a warrant may issue upon the requisition of the proper authorities of the United States, or of any such states, for the surrender of such person, according to the stipulation of the said treaty; and the said judge, or the said justice of the peace, shall issue his warrant for the commitment of the person so charged, to the proper gaol, there to remain until such surrender be made, *or until such person be discharged according to law.*" (Sec. 1.)

The question which I am now considering turns upon what we must take to be meant by these last words in the clause, "or until such person be discharged according to law." Do they mean only until the person shall be discharged under the express power given in the fourth clause, on account of delay in delivering him up, or do they mean until he be discharged by either of the superior courts, or by any judge thereof, interposing upon an application of the prisoner, between the commitment by the justice and his actual surrender to the foreign country, and assuming the authority of discharging the prisoner, upon his view of the evidence on which the justice had decided? Whether the treaty, ratified as it has been by the imperial parliament, taken in connexion with our statute, can be held to leave the superior courts in possession of any other power than the power to discharge the prisoner under the fourth section on account of delay in delivering him over, after he has been committed, and the evidence certified to the government, is a question which we should probably feel it necessary carefully to consider, in conjunction with the



judges of the other superior courts, before we exercised the power of discharging.

No application under the fourth clause, upon the ground of delay, has been made to us, as I have already stated. Our interposition on any other ground it may at least be said is not clearly provided for in the act, and it may be a question, since the whole proceeding is founded on a public treaty between two sovereign powers, whether each party to that treaty cannot hold the other to a compliance with its terms, without impediment from the exercise of a jurisdiction over the subject matter within either country beyond what is provided for in the treaty.

I feel that, on the other hand, the argument is strong for the necessity of a controlling power in the superior courts, without which the Governor must be left with the responsibility of exercising with the assistance of his legal advisers, whatever discretion he may find to be reposed in him by the statute.

A more full consideration of this question by either of the superior courts, whenever it may become necessary, may probably result in removing any such doubts as I have stated; for two learned judges, of whose assistance we can unhappily no longer avail ourselves, have, in cases before them as individual judges in chambers, assumed that they had the power in cases like the present to examine into the correctness of the conclusion come to by the committing justices upon the sufficiency of the evidence. I refer to, Kermott's case, (Vol. 1, of Cases in the Judges' Chambers, 253,) and to Tubbee's case, case (1, P. R. 98.)

In the former case the authority was assumed to exist, and was acted upon by discharging the prisoner. The latter case, as the commitment showed, could not by possibility come under the Ashburton Treaty, for it was the crime of bigamy that the prisoner was charged with, and nothing therefore that was said or done in the case would necessarily apply as authority in the case now before us. The prisoner was discharged on the ground that our earlier statute 3 W. IV., ch. 6, under which it had been urged that the prisoner could be surrendered to a foreign government, had been

superseded by the Ashburton Treaty and the statute which followed it. But the late Sir *James Macaulay*, for whose opinion great respect will ever be entertained in this court, in disposing of the application before him, expressed a strong view in favour of the power of the superior courts to examine into the sufficiency of the evidence returned by the committing magistrate, to establish the charge upon which he had committed a prisoner in pursuance of the Ashburton Treaty.

With these authorities in favour of an examination by us of the testimony which has been returned by the committing magistrate, and with no decision that I am aware of to the contrary, we have not hesitated to consider the depositions which have been before us in the present case; and I will not forbear, in consequence of any such doubts as I have stated, to express my opinion upon the effect of them—I mean their effect in a legal point of view, when taken in connexion with the treaty and our statute, Consol. Stats. C., ch. 89—and I shall do this in as general terms as I can, in order that nothing said by me here may prejudice a case of this serious description, which, according to the view we may take of the law, may have to receive the consideration of a jury in the country where the offence is said to have been committed.

I have not thought it necessary to dwell upon the proof of identity of the prisoner, or to refer particularly to the witness, W. C. Baker, upon that point, which is direct and explicit; for the whole course of cross-examination of the witnesses on the part of the prisoner, and the very ground on which his discharge had been pressed, is founded upon his identity with the person who killed Diggs, and on the fact, which it is contended is manifest, that he was engaged at the time in a struggle for freedom.

The point which has been argued before us, and the only point, is what construction and effect it is proper to give to those words in the treaty and in our statute (Consol. Stats., C., ch. 89, sec. 1,) which, when read together, in effect provide that a person charged with committing within any of the United States of America any of the offences mentioned in the treaty: that is to say, murder, or assault with intent to commit murder, piracy, arson,

robbery, or forgery, and charged "*upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed,*" may be apprehended upon complaint made under oath, in order that he may be brought before the judge, or justice of the peace, who has caused him to be apprehended, to the end that the evidence of his criminality may be heard and considered, and that "*if, on such hearing, the evidence be deemed sufficient by him to sustain the charge according to the laws of this province, if the offence alleged had been committed therein, he shall certify the same, together with a copy of all the testimony taken before him, to the Governor, that a warrant may issue upon the requisition of the proper authorities of the said United States or of any of such states, for the surrender of such person charged according to the stipulation of the said treaty.*"

It will be observed that in one part of the treaty, as recited in the statute, the evidence of criminality is required to be such as would justify *the apprehension of the party and his commitment for trial*, if the offence had been committed in the country where he is found, while in another part the evidence is required to be such as shall be deemed sufficient *to sustain the charge*.

Nothing can turn I think upon this variation of expression, but we must look upon the same thing as intended by both, for in the treaty, as recited in the commencement of the statute, it is declared to have been agreed by the two powers, that offenders charged with certain offences, flying from one country into the territories of the other, should be *delivered up to justice*—"Provided, that this shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive so charged shall be found, *would justify his apprehension and commitment for trial, if the crime or offence had been there committed.*"

This shews that nothing more can be meant by the other form of expression than by this, since by the treaty evidence sufficient *to commit the party for trial* is all that is required



to warrant his being given up. And indeed it would not be reasonable to require more.

I think "*the sufficiency of the evidence of criminality to sustain the charge according to the laws of this province if the offence alleged had been committed therein,*" is to be determined by the judge or justice upon his view of the transaction, as described in the testimony, taken in connexion with the law of the foreign state where it occurred, as regards the offence in question, and also with reference to the law which governs our own courts and magistrates in regard to the sufficiency of the evidence; that is, its sufficiency in point of legal character, and its adequacy to support the charge of the offence against the law of the foreign country.

I will not take upon me to say that there is absolutely no ground for doubt or discussion upon the meaning of those words in the statute which I have last cited. I can see that what I take to have been the certain intention of the treaty, and of our statute, might have been more clearly expressed; but I really cannot say that I have any doubt that the intention was that the judge or justice who has heard the testimony is to determine whether the evidence of criminality, if fully credited by a jury and not repelled in any essential point, is such that it can be truly said that the facts are strong enough and the proof clear enough, according to the laws of this province, to sustain the charge. What charge? —the charge, in the case before us, of having committed in the state of Missouri the crime of murder.

It has been argued on the part of the prisoner that both of the passages in the statute in which the sufficiency of the evidence to prove the criminality is spoken of have reference to the law of this province, not merely as regards the nature of the proof that may be received and its conclusive tendency, but also to the law of this province as regards the particular offence, and in relation to whatever circumstance may have influenced the party in committing the act. I cannot go the whole length of that argument as it has been endeavoured to apply it in this case.

So far as regards the means of proof, there can be no doubt that it is our law which must govern, according to the

provision in the statute. If, for instance, the law of Missouri should admit a confession extorted from a slave by violence or threats to be used against him on a charge of this kind, we must reject such evidence notwithstanding, when produced here; and if without it the criminality should not appear to be established, the prisoner could not be detained. So, also, if the law of Missouri should allow evidence of a free man not on oath to be admitted against a slave charged with having committed a crime against a free man, the judge or justice could not act upon such evidence here. The reason in favour of precaution, to this extent at least, is glanced at by Lord Chief Justice *Willes* in the case of *Omichund v. Barker*, (*Willes* 549,) where a very different question from the present was under discussion. "I entirely disagree," he observed, "from what is reported to have been said by Lord Chief Justice *Ley*, in 2 Rol. Rep. 346, that in the trials of matters arising beyond sea we ought to allow such proof as those beyond sea would allow. This would be leaving the point on so very loose and uncertain a foot, that I cannot come into it; for if this rule were to hold, considering in what a strange manner justice is administered in some foreign parts, God knows what evidence must be admitted."

But the construction contended for would seem to exact that there should be a similarity between the law of the state from which the person has fled and that of our country in all the features and attributes of the particular crime. To some extent it might be reasonable to hold that the law of the two countries should be found to correspond. For example, if it were the law of Missouri that every intentional killing by a slave of his master, however sudden, should be held to be murder, without regard to any circumstances of provocation, or of any necessity of self-defence against mortal or cruel injury, I do not consider that a fugitive slave, who according to the evidence could not be found guilty of murder without applying such a principle to the case, could legally be surrendered by the treaty. But I could not go the length of holding that because a man could not, in the nature of things, be killed in this province while he was

pursuing a slave, because there are not, and by law cannot be, any slaves here, therefore a slave who has fled from a slave state into this province cannot be given up to justice because he murdered a man in that state who was at the time attempting to arrest him under the authority of law, in order to take him before a magistrate with a view to his being sent back to his master.

It would not be right, I think, to hold that the fugitive should, under such circumstances, not be surrendered, and to hold this without reference to what the positive law of that country might allow, or to the conduct of the party pursuing or the party pursued, or to the knowledge of the latter that the purpose for which it was desired to arrest him was not contrary to the law of the country, or to the fact, (if it should be so,) that there was no apparent necessity to inflict death in order to escape.

The statute has been about ten years in force, and, so far as I know or have heard, if the construction that is now insisted upon were established, it would be a new construction.

Neither the treaty nor the statute can be taken to have been founded on a presumption that the criminal or the civil law prevailing in the territories of the two contracting powers would be found to be the same. In arson and in forgery, for instance, it is likely there may be points of difference as regards the descriptions of property, and of the written securities, which it is the object of the law in the several countries to protect, though, as regards murder, there is nothing in the evidence to establish that the legal definition of the crime is not the same in the state of Missouri as in Canada.

Now we know that a person who in Canada wilfully kills another without justification or lawful excuse is guilty of murder, the law deeming the act to have been malicious. There is nothing before us to show that the law is otherwise in Missouri.

I use the word *excuse* in a sense that would include any circumstances, of provocation or otherwise, that should obviously in law reduce the act to manslaughter.

The evidence which the justices had before them tends to



shew that Anderson, the prisoner, stabbed Diggs, the deceased, while he, Anderson, was endeavouring to escape from him, and while Diggs was endeavouring to prevent such escape, and to take him before a magistrate, in order to his being restored to McDonald, his master. Anderson was still in the state of Missouri, where he had been living many years, if not all his lifetime; and though he was 20 or 30 miles away from McDonald, yet it rests only on his own declaration that he had resolved, if possible, to leave the state, and to escape from slavery entirely. Whether that was or was not his intention at the time, we see that the law of Missouri, of which such evidence has been received as by the existing state of the law both in England and in Canada is now admissible, (Baron DeBode's case, 8 Q. B. 208, 246, 254, Sussex Peerage case, 11 Cl. & Fin. 85,) authorises any person to apprehend any negro or mulatto being or suspected of being a runaway slave, and to take him before any justice of the peace, who may deliver him to his owner.

It is true it is not proved that the prisoner, if he was attempting to escape from slavery altogether, or only from the immediate control of his master, was in either case committing any criminal offence against the law of Missouri, nor is it shewn that the law of that state made it the duty of Diggs to apprehend him, under the circumstances in which he found him; but Diggs having, as it appears, authority to take him up and carry him before a magistrate, under the general law of the state, it cannot be said that he was acting illegally at the time that Anderson rushed upon him and repeatedly stabbed him with a deadly weapon. He was acting under legal authority as much as if he had been armed with process, the fact being proved, and not denied, that the statute law of Missouri applied to the prisoner under the circumstances in which he was; and unless Diggs abused his authority by using a degree of violence uncalled for by the circumstances, the killing of him was not justifiable; nor can it be said, I think, that the facts of the case lead plainly to the conclusion that the act of the prisoner, Anderson, should be held to be nothing more than manslaughter.

Upon his trial on the charge of murder, if he shall be surrendered, and if he shall be tried for that offence, it will be for the jury to dispose of the case under the direction of a judge. There may then appear sufficient reasons to warrant the jury in taking a favourable view of the case, and to lead them to think it probable that the prisoner advanced towards the deceased and stabbed him under an apprehension that it was necessary, not merely to facilitate his own escape, but to save his life, or to avert threatened violence at the moment. But the case, in my judgment, is not one in which the justices at Brantford would have been warranted in assuming the functions of a jury, and intercepting a trial for the graver offence.

We may be told that there is no assurance that the prisoner, being a slave, will be tried fairly and without prejudice in a foreign country; but no court or magistrate can refuse to give effect to an act of parliament by acting on such an assumption; nor can we be influenced by the consideration, a very painful one in all such cases, that the prisoner, even if he shall be wholly acquitted of the offence imputed to him, must still remain a slave in a foreign country.

That was a consideration to be entertained while the subject of the treaty was under discussion, and before it became a law. It might also have engaged attention in framing its provisions, and we cannot think it probable that it did not. But neither the treaty nor the statute makes allowance for the circumstance of a fugitive offender having been a slave in the country from which he fled. That is not recognised in the treaty as a reason against his surrender to be tried for murder, arson, or any other crime specified in the statute, though it could not have escaped attention that the consequence of the surrender would be the putting the fugitive in the power of his master in case of his acquittal.

Those who are to act judicially in carrying the statute into effect must, so far as the statute allows, carry out the treaty faithfully. They have no right to decline doing so on account of any distinction or consideration which neither the statute nor the treaty has made the ground of an exception; and when we say of a court of justice that they have not the *right* to take

a particular course, we say the same thing in effect as that they have not the power. In my opinion, therefore, we are bound to remand the prisoner.

If there has been any understanding between the government of the United Kingdom and the American government, or any instructions upon the subject of delivering up slaves flying from one of the United States to Canada, and charged while here with having committed in the United States some one of the crimes mentioned in the treaty, it is probable that the Governor of the province is aware of such understanding or instructions; and his power under the statute or the treaty to surrender a fugitive, or to decline to surrender him, cannot be affected by any thing that may be said or done by us here.

It is equally clear that the justices who had to deal with the case in the first instance, or we, who are applied to as a court of law to overrule their decision, must conform to what the law requires, and are not at liberty to act upon considerations of policy, or even of compassion, where a duty is prescribed. To use the words of a great judge in dealing with a case in which slavery and its consequences were discussed—"We cannot in these points direct the law; the law must rule us."

McLEAN, J.—The prisoner has been brought before us from the gaol of the county of Brant, upon a *habeas corpus*, issued by order of this court during the present term; and in compliance with the injunction contained in the writ, the sheriff has returned the warrant under which the prisoner has been detained in gaol, for the purpose of showing the day and cause of his taking and detainer. The evidence taken before the justices of the peace by whom the prisoner was committed to gaol has also been brought before us by *certiorari*.

Upon this return and evidence we have now to enquire whether the prisoner has been legally committed, and whether he is legally detained in custody.

The information and complaint, as it is called, appears to have been made by one James A. Gunning, of the city of



Detroit, so far back as the 13th day of April last, before William Mathews, Esq., a justice of the peace for the county of Brant, and sets forth that one John Anderson did, on the 28th day of September, 1853, wilfully, deliberately, and maliciously murder one Seneca T. P. Diggs, in the county of Howard, in the state of Missouri, one of the United States of America; *all of which this deponent doth verily believe.* Whether any warrant was issued on this complaint, or if a warrant was issued, when or where it was executed does not appear. The magistrate, in the absence of any more positive information than mere belief of such a crime having been committed, might well have hesitated before issuing a warrant to apprehend the prisoner, and without being chargeable with any dereliction of duty might have called for some proof of a murder having been committed, and of the identity of the party accused as the murderer. No other information or complaint is given as the foundation for issuing the warrant, and I must therefore assume that it was issued on that complaint alone.

The 1st section of chapter 89 of the Consolidated Statutes of Canada, respecting the treaty between Her Majesty and the United States of America, for the apprehension and surrender of certain offenders, provides that upon complaint made under oath or affirmation, charging any person found within the limits of this Province with having committed, within the jurisdiction of the United States of America, or of any of such states, any of the crimes enumerated or provided for in the treaty—namely, murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper—any of the judges of any of Her Majesty's superior courts in this province, or any of Her Majesty's justices of the peace in the same, may issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or justice of the peace, to the end that the evidence of criminality may be heard and considered.

Whether the affidavit of Gunning, that he believed the crime of murder had been committed by one John Anderson, was sufficient or not, it is clear that the justice of the peace

thought it so, and acted upon it ; for during the whole examination in reference to the charge he professes to proceed upon it as a charge made by J. A. Gunning, though in the warrant of commitment the prisoner is stated to be charged on the oath of William C. Baker, of Howard county, Missouri, and others, the name of Gunning nowhere appearing during the whole investigation, except as swearing to his belief in the original affidavit. If the prisoner had been brought up on *habeas corpus* while in custody on a warrant issued on that affidavit alone, I incline to think that he would be entitled to his discharge, from the want of such a charge as is contemplated by the statute to justify the issuing of any warrant ; but being in custody, and further proceedings having taken place, and the evidence of criminality being heard and considered by the justice of the peace, and the prisoner in consequence committed to gaol until delivered by due course of law, the question is whether he is now detained in legal custody.

The clause of the statute to which I have referred provides that if, on the hearing of the evidence of criminality by the justice of the peace, it is deemed sufficient by him to sustain the charge according to the laws of this province, if the offence alleged had been committed herein, he shall certify the same, together with a copy of all the testimony taken before him, to the Governor, that a warrant may issue, upon the requisition of the proper authorities of the United States, or of any of such states, for the surrender of such person according to the stipulations of the treaty ; and the justice of the peace shall issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender be made, or until such person be discharged according to law.

The commitment under which the prisoner is in custody is certainly not in conformity with the statutes, either in form or substance. There is nothing on the face of it to indicate that any evidence has been examined by the justices who signed it touching a complaint against the accused for an alleged murder in the state of Missouri ; nothing to shew that the justices, having heard and considered evidence of criminality on a charge for such an offence against the

prisoner, have considered the same sufficient to sustain the charge according to the laws of this province if the offence alleged had been committed therein ; nothing on the face of it, except a recital that the prisoner had been on that day charged, apparently for the first time, on the oath of William C. Baker, of Howard county, in the state of Missouri, and others, for that he did, in that county and state, on the 28th of September, 1853, (exactly seven years before the date of the commitment,) wilfully, maliciously, and feloniously stab and kill one Seneca T. P. Diggs, of the same county. For this alleged offence all or any of the constables of the county of Brant are commanded to take John Anderson, and safely to convey him to the common gaol at Brantford, and there to deliver him to the keeper thereof ; and then the keeper of the common gaol is commanded to receive John Anderson into his custody in the said common gaol, and there safely keep him until he shall be delivered by due course of law.

The commitment is nothing more or less than an ordinary commitment to the common gaol at Brantford for trial for an offence alleged to have been committed in the state of Missouri, one of the United States of America. Now, what is the due course of law by which the accused is to be delivered in such a case ? There is no course of law in this province which can take cognizance of such a case, none by which he can be delivered from the gaol, except that which has now been adopted. There is nothing before us to shew that the justices of the peace who have examined the evidence, or rather the justice of the peace who certifies the evidence as having been taken before him, has come to any determination that it is sufficient to sustain the charge according to the laws of this province, if the alleged offence had been committed therein, or that he has certified his decision on the evidence, together with a copy of all such evidence to the Governor.(a) It is not unreasonable to assume the contrary, or at all events that he has arrived at no decision, from the fact that the prisoner has not been committed to gaol by him there to remain until a surrender is made upon the requisition of the proper authorities, as required by the statute, or

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(a) But see note to page 133.



until discharged according to law. By this commitment the prisoner is not in custody awaiting a surrender under the treaty with the United States, but is in gaol awaiting a discharge according to law. If the object and intent of the commitment were plain upon the face of it, so that we could take judicial notice of it, this court might remedy any mere technical defects and correct any want of form. The case of the *King v. Marks and others*, (3 East 157,) and the form there given, shew that this may be done in ordinary cases; but as the commitment in this case must depend upon the view which the justice of the peace may have taken as to the sufficiency of the evidence to sustain the charge according to the laws of this province, and we have no means of knowing what that view is, we cannot, as it appears to me, take it upon ourselves to make an amendment in the commitment, which would only be correct in one state of circumstances.

The same objection exists to the sending back of the commitment to the magistrate, with directions for him to make the necessary amendments to remove the legal objections. We have no right, as it appears to me, to assume that there is any thing that requires amendment in the commitment, inasmuch as it depends upon the view the justice of the peace may have taken of the evidence, and the certificate or return which he may have made, if he had made any, to the governor, (a) whether an amendment may or may not be necessary under the statute.

Then as to the designation of the offence with which it is alleged the prisoner was charged on the 28th of September last. It is stated that he was on that day charged, on the oath of Willian C. Baker and others, without stating who those others were, for that he did, in Howard county, in the state of Missouri, on the 28th day of September, 1853, wilfully, maliciously, and feloniously stab and kill one Seneca T. P. Diggs. That is the offence alleged to be charged by Wm. C. Baker and others to have been committed by Anderson, and the charge is stated to have been made on a particular day, long subsequent to the information and complaint said to have been made by J. A. Gunning, so that the latter appears to have been abandoned, and all proceedings under it, if any were adopted, up to the 27th of September last.

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(a) But see note to page 133.

There is no charge of murder in the offence alleged against Anderson by Wm. C. Baker, and we cannot assume that it was intended to prefer a charge for murder, for in truth the deposition made by Baker before the justice of the peace, which is returned with the evidence, contains no charge whatever against the prisoner. He expressly says in his deposition that *he did not see the wound made* of which Diggs is said to have died, and that he came to this province employed and paid by the county of Howard for the purpose of identifying the prisoner. He does not pretend to give any statement of his own, or to make any charge against the prisoner. All he does say as to the cause of the death of Diggs he says Diggs told him, so that in truth the greater portion of what his deposition contains is a detailed statement of his several conversations with Diggs. He says he saw Diggs twice after he was wounded, the last time four days before his death: that he lived fourteen days after being wounded, and the first time he saw him that he told him certain things, of which a detailed account is given: that Diggs appeared to be suffering very much, and the doctor said he would die from the wound. There is nothing, however, in the whole statement, as given by Baker, to show that Diggs related the circumstances under the conviction that his wound would certainly prove fatal. It does not appear at what period of Diggs' illness the statement was made by him. It was at Baker's first interview with him, when, as Baker says in his deposition, Diggs understood what he was talking about. The statement, in the absence of any proof that it was made by Diggs in the full belief that his life was drawing speedily to a close, ought not to have been received, and cannot be considered as legal evidence, so that, without the necessary requisite to confer that character on the hearsay statements of Baker, they cannot possibly form the foundation of a criminal charge against the prisoner. In fact, then, there is no charge on the oath of William C. Baker, such as is stated in the commitment against the prisoner.

Then there is the testimony of Benjamin F. Diggs, son of Seneca T. P. Diggs, who was with his father at the time he was stabbed, and who at that time was a little better than

eight years of age. He gives an account of a coloured man being pursued by his father and four negro men and boys, his slaves, for the purpose, as he supposes, of capturing him and returning him to a state of slavery with his former master. He states that his father was in pursuit of the coloured man, about a mile from his own house, when he was stabbed; and that he had got over a fence, and had proceeded five or six yards, the witness being then on the fence, when he and the coloured man met; that there was no one with them but himself; that his father was first stabbed in the breast, and after that turned to run away; that his foot caught or hung in some vines, and he fell, and the man then stabbed him in the back and ran away; that his father got up after receiving the last wound, and walked fifteen or twenty yards, when he again fell; that he remained where he last fell about an hour, nobody being with him but the witness, the other parties being still running after the nigger, as the coloured man is called; that after this some one was heard hallooing, and being answered by witness, by desire of his father, Dr. Crewse and one of Diggs' slaves came to where they were. He then describes how his father was taken to the house of Dr. Crewse, about half a mile from where the wound was inflicted, where he remained till he died. This witness says very candidly that he had never seen the coloured man who stabbed his father before that time; that the prisoner was about the colour and size of the man, but he would not swear he is the man. On his cross-examination he admitted that the negroes ran in a circle; that his father and he went across, and that his father had just got over the fence when he and the negro met: that his father had a little stick in his hand, and struck the negro with it, but not, as he alleged, till the negro ran at him with an open knife; that the stick caught in some bushes and broke, and the negro then stabbed his father; that one of his father's coloured boys was about twenty yards off when his father was stabbed.

The statement of this boy contains in itself no charge against the prisoner, for he is unable to say that the prisoner is the man by whom his father was stabbed; but it was



taken no doubt to support a charge previously made, as was also the testimony of his brother, Thomas D. Diggs, as to the dying declarations of his father. So far as the statement is confined to these declarations relative to the cause of death, and the circumstances connected with it, it forms admissible evidence even upon a trial for murder, and could not be excluded in such an investigation as that conducted by the justices of the peace in reference to the case of the prisoner. Unfortunately, however, the dying declarations of the father are so mixed up with individual statements of the son, that it is sometimes difficult to distinguish the one from the other. This witness was not at home when his father received his wound, and consequently could personally give no testimony as to what preceded it, except from hearsay. He professes to give his father's declaration to him a few days before his death, when he was aware that he would die, and then at the close of it adds some comments of his own as to the lightness of paw-paw wood, and the size to which it grows, though in his father's statement there is nothing to shew that the stick with which he struck at the negro in defending himself was of that description of wood. He also makes statements as to the comparative weight and strength of his father and the negro by whom his father was stabbed, and the object of his father in pursuing the negro, and his desire to catch him and return him to slavery; but these statements may have been elicited in answer to questions put to the witness, and are only objectionable so far as they are mixed up with the evidence of the dying declarations of his father.

As to such declarations "made in extremity, when the party is at the point of death, and when every hope of this world is gone," (a) though they are admissible from necessity in cases of homicide, they are not free from objections. For there is, first, the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain—secondly, the danger of letting in incomplete statements, which, though true as far as they go, do not constitute the whole truth—and, thirdly, the experienced fact, that implicit reliance cannot in all cases be placed on the declarations

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(a) See *Rex v. Woodcock*, 1 Lea. Cr. C. 502.

of a dying person; for his body may have survived the powers of his mind; or his recollection, if his senses are not impaired by pain or otherwise, may not be perfect; or, for the sake of ease, and to be rid of the importunity of those around him, he may say or seem to say whatever they may suggest.

In the evidence of the declarations of Diggs *in extremis*, the conversation alleged to have taken place between him and the negro previous to the latter attempting to escape is given, and it is there stated that the negro, in reply to questions put to him, acknowledged that he *belonged* to a man of the name of McDonald, but did not want to live on the other side of the river, and that Samuel Brown had his wife. The testimony of Wm. C. Baker establishes that the prisoner was regarded as the property of one McDonald, and that one Samuel Brown, residing in the vicinity of his former residence, had his wife as a slave. These statements would seem to identify the prisoner as the person who was pursued by and ultimately stabbed and caused the death of Diggs; but any other negro endeavouring to make his escape, and determined to effect it, knowing the position of the prisoner, might make the same statement with a view to mislead as to his identity in the event of pursuit; so that too much confidence ought not to be placed in the alleged conversation of Diggs with his son, as establishing conclusively the identity of the prisoner as the person who stabbed Diggs.

But that point would be established beyond question, if an affidavit taken in Missouri, by a slave of Mrs. Diggs, of the name of Phil, could legally be received in evidence. After stating various circumstances connected with the attempt to capture the prisoner, he states that the negro who killed his master was named Jack: that he once belonged to Moses Burton of Howard county, and had a wife at Samuel Brown's; and that he had seen him and known him before the day he killed his master. I do not feel at liberty to reject that deposition, if otherwise legally receivable in evidence, because the individual who made it is a slave, and in the state in which it was taken is regarded as a mere chattel, and incapable of giving evidence generally; but if not legal evidence in this province, apart from any considera-

tion of that kind, I cannot, in this examination of the proceedings of the justice of the peace, consent to consider it as legal because it seems to have been received without objection there. The second section of chapter 89 of the Consolidated Statutes, enacts that "in every case of *complaint as aforesaid*, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any of the said United States may have been granted, certified under the hand of the person or persons issuing such warrant, or under the hand of the officer or person having the legal custody thereof, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended." The affidavit or deposition in question does not come within that section. It does not profess to be a copy of any original deposition used for the purpose of obtaining a warrant. Indeed it does not appear that any attempt was ever made in Missouri to procure a warrant; but why should there be such an attempt when every white man is at liberty to arrest any coloured man whom he suspects to be a runaway slave? That deposition, then, taken in Missouri, and unsupported even by any testimony that it was ever sworn to, was improperly admitted before the justice of the peace, and though received by consent of counsel I think must be rejected, as the case of the prisoner, as it now stands before us, can only be decided on the consideration of such evidence as is strictly legal.

Looking; then, at all the testimony taken before the justice of the peace, and rejecting such portion as is only hearsay and inadmissible, there is not a witness who connects the prisoner with the stabbing of Diggs, unless it be Thomas L. Diggs, in his statement of the death-bed declarations of his father to him; and these only shew that the negro by whom Diggs was stabbed made certain declarations as to himself and his identity, which would be true if made by the prisoner; but rejecting the deposition of the slave Phil, there is no testimony which establishes satisfactorily that the prisoner is the person who caused the death of Diggs.

On the grounds, therefore, that the prisoner was arrested



in the first instance on an insufficient complaint, and that he is now detained in custody on a warrant of commitment until discharged by due course of law for an offence committed in a foreign country; and on the further grounds, that the offence stated in the warrant of commitment is not one for which the prisoner is liable to be detained under the provincial act for carrying out the treaty with the United States for the surrender of certain fugitive criminals; and that the evidence, as given before the justice of the peace, is of too vague a character to establish the offence of murder against the prisoner according to the laws of this province, I am of opinion that the prisoner is now entitled to be discharged from custody.

In coming to this conclusion I have been guided solely by a consideration of what has been returned to us as the evidence taken before the justice of the peace, and have not adverted to the important question whether, if the testimony were clear that the prisoner, a slave in the state of Missouri, in making his escape from bondage in that state killed a person, who, with a number of slaves under his orders, endeavoured to seize him in order to return him to slavery, he can be considered guilty of murder.

In considering that question, it is not what would be sufficient according to the laws of Missouri to sustain the charge of murder, but whether the evidence adduced before the justice of the peace in this case is sufficient to sustain such charge according to the laws of this province, if the offence alleged, of murder, had been committed therein: or, in other words, if Diggs had been killed in this province, would the evidence adduced before the magistrate be sufficient, according to the laws of this province, to sustain the charge of murder against the prisoner, Anderson.

It is impossible that a similar case can occur in this province, because, happily, it is our proud boast that we are all free, and that in respect of civil rights all are not merely nominally but in reality placed by the law of the land on an equality. It is difficult even to imagine a parallel case, for the law is so tender, and guards so carefully against the infringement of personal liberty, that an action is given for

the slightest violation of it, and any person is at liberty to defend himself at any hazard against any attempt to reduce him to a state of bondage. The difficulty of imagining a parallel case suggests the idea that it will be better to take the case of the prisoner as it has been attempted to be established by evidence, and apply to such evidence the rules of law by which we must be bound if such a case occurred in this province.

The facts, then, to which the evidence applies, are, that Diggs was a farmer residing on land of his own, in Howard county, in the state of Missouri: that the prisoner was a slave, bound, himself and his children, to perpetual servitude to any person to whom they might be transferred, and in 1853 a slave of one McDonald, living in Saline county, in the state of Missouri: that he had been transferred to McDonald by his former master, one Moses Burton, and compelled to remove from the immediate vicinity of his wife and child to a distance of 30 or 32 miles, where his new master resided: that he left McDonald's, and was seen at Samuel Brown's, where his wife was a slave, in September, 1853; and that he was chased there by several persons, for the purpose of returning him again to McDonald as a slave, but succeeded at that time in making his escape from them: that soon after, while still engaged in trying to make his escape from the man who claimed him as his property, he was passing over Diggs' farm, when he was accosted by Diggs, and asked whether he had a pass, and was told that without a pass he would not be allowed to proceed: that the prisoner attempted to escape by running away, and was pursued by Diggs and four slaves under his orders: that Diggs encouraged his slaves in the pursuit by offering to them the premium of five dollars, to which under the law of the state he would be entitled for the arrest of a slave attempting to become free by escaping from his master; that, after pursuing the prisoner upwards of a mile from his own house, Diggs, with a stick in his hand, in order to intercept the prisoner, crossed a fence and approached him, and that, on their meeting, Diggs struck at the prisoner with his stick, as it is alleged, in self-defence, and the prisoner, with a knife

which he had in his hand, inflicted a wound or wounds which caused the death of Diggs.

The law of England, or rather of the British Empire, not only does not recognise slavery within the dominions of the Crown, but imposes upon any British subject who shall have become the owner of slaves in a foreign state the severest penalties, and declares that all persons engaged in carrying on the slave trade, when captured at sea, shall be liable to be treated as pirates. In all the British possessions the institution of slavery, which at one time prevailed to a certain extent, was abolished at the enormous expense of twenty millions of pounds sterling in remunerating the holders of slaves. An immense amount has since been expended in efforts to suppress the African slave trade, and by every possible means the British government has put down and discountenanced the traffic in human beings.

Even when slavery was tolerated in some of the British possessions, no person could be brought into England without becoming free the moment he touched the soil; and though other nations have not chosen to follow the noble example of the British nation, and some are even yet embarking in nefarious and unchristian attempts to import human beings from the coast of Africa to be held in perpetual bondage, for the purpose of this world's gain, even at the risk of being regarded as pirates, happily the traffic has become too uncertain and too hazardous to be carried on to so great an extent as formerly prevailed. In the adjoining republic the evils and the curse of slavery are every day becoming more manifest, and even now threaten to lead to a dissolution of the federal compact of the United States, under which the several states have enjoyed an unexampled degree of prosperity. The evil is not less revolting in a social point of view, for though the laws of some of the states of the Union may tolerate the dealing in human beings as if they were sheep or oxen, the best feelings of our nature must shudder at the thought of the severance of those endearing relations which usually form the solace and happiness of mankind. A father and mother, husband and wife, are liable, at the caprice of a master, or perhaps from his necessities, to be separated from



each other and from their children ; and they are bound to submit, or if they attempt to escape from bondage, and to consult their own happiness in preference to the gain of their masters, are liable to be hunted by any white or black man who chooses to engage in the pursuit, and when captured are liable to severe punishment and increased severity from their task-masters.

The prisoner, Anderson, as appears by the statement of Baker, who came to this province to identify him, has felt the horrors of such treatment. He was brought up to manhood by one Moses Burton, and married a slave on a neighbouring property, by whom he had one child. His master, for his own purposes, disregarding the relationship which had been formed, sold and transferred him to a person at a distance, to whose will he was forced to submit. The laws of Missouri, enacted by their white oppressors, while they perpetuate slavery, confer no rights on the slaves, unless it be the bare protection of their lives. Can it, then, be a matter of surprise that the prisoner should endeavour to escape from so degrading a position ; or, rather, would it not be a cause of surprise if the attempt were not made ? Diggs, though he could have no other interest in it than that which binds slaveholders for their common interest to prevent the escape of their slaves, interfered to prevent the prisoner getting beyond the bounds of his bondage ; and with his slaves pursued and hunted him, with a spirit and determination which might well drive him to desperation ; and when at length the prisoner appeared within reach of capture, he, with a stick in his hand, crossed over a fence and advanced to intercept and seize him. The prisoner was anxious to escape, and in order to do so made every effort to avoid his pursuers. Diggs, as their leader, on the contrary, was most anxious to overtake and come in contact with the prisoner for the unholy purpose of riveting his chains more securely. Could it be expected from any man indulging in the desire to be free, which nature has implanted in his breast, that he should quietly submit to be returned to bondage and to stripes, if by any effort of his strength, or any means within his reach, he could emancipate himself ? Such an expecta-

tion, it appears to me, would be most unreasonable, and I must say that, in my judgment, the prisoner was justified in using any necessary degree of force to prevent what to him must inevitably have proved a most fearful evil.

He was committing no crime in endeavouring to escape and to better his own condition; and the fact of his being a slave cannot, in my humble judgment, make that a crime which would not be so if he were a white man. If in this country any number of persons were to pursue a coloured man with an avowed determination to return him into slavery, it cannot, I think, be doubted that the man pursued would be justified in using, in the same circumstances as the prisoner, the same means of relieving himself from so dreadful a result. Can, then, or must, the law of slavery in Missouri be recognised by us to such an extent as to make it murder in Missouri, while it is justifiable in this province to do precisely the same act? I confess that I feel it too repugnant to every sense of religion and every feeling of justice to recognise a rule, designated as a law, passed by the strong for enslaving and tyrannising over the weak—a law which would not be tolerated for a moment, if those who are reduced to the condition of slaves, and deprived of all human rights, were possessed of white instead of black or dark complexions.

The Declaration of Independence of the present United States proclaimed to the world that all men are born equal and possessed of certain inalienable rights, amongst which are life, liberty, and the pursuit of happiness; but the first of these is the only one accorded to the unfortunate slaves; the others of these inalienable rights are denied, because the white population have found themselves strong enough to deprive the blacks of them. A love of liberty is inherent in the human breast, whatever may be the complexion of the skin. "Its taste is grateful, and ever will be so, till nature herself shall change;" and, in administering the laws of a British province, I can never feel bound to recognise as law any enactment which can convert into chattels a very large number of the human race. I think that on every ground the prisoner is entitled to be discharged.

BURNS, J.—In considering and disposing of the question raised in this case, we must keep in mind that the subject is brought before us on the application of the prisoner, and not on behalf of or by the Crown in any way; and the simple question at present is whether the prisoner is now in legal custody.

It might be a question upon the construction of the Extradition Act, chapter 89 of the Consolidated Statutes of Canada, whether the prisoner could intervene between the committing magistrate and the Governor-General, by a writ of *habeas corpus*, to take the opinion of a court of law upon the sufficiency of the evidence of criminality. That question has not been raised, and if it had been I should be disposed, in favour of liberty, to consider that a prisoner might obtain the opinion of a court upon the sufficiency of the evidence to charge a person with any of the offences mentioned in the treaty: that is, to examine the evidence with a view of determining the sufficiency of it to call the matter to the attention of the executive government under the treaty. The opinion of the committing magistrate is not binding upon the Governor-General, for the magistrate must return, with his certificate of his opinion, a copy of all the testimony taken before him to the Governor-General, in order that final action may be taken by the government. No power is given by the act to obtain a writ of *habeas corpus* except in cases under the fourth section, where the prisoner has remained in custody more than two months without a requisition having been made. Though no such power has been expressly given by the act, yet I suppose the bare right to have the writ will not be denied, and that the cause of detention should be returned with it would seem naturally to flow from that right.

That being so, then, we see, upon the return of the writ, that the cause of detention is that the prisoner is charged with having committed murder in a foreign country, and the offence is one of the crimes enumerated in the treaty by which the two governments stipulated with each other mutually to surrender criminals. The warrant of commitment is not perhaps strictly technical in terms, but that affords



no ground for discharge of the prisoner, for we have before us the evidence of criminality upon which the magistrate acted, and therefore we must look at that with the warrant.

The whole argument in the prisoner's favour must rest upon the proposition that as he was a slave, and killed the person he is said to have killed in freeing himself from slavery, and that slavery not being recognised or tolerated in this country, the prisoner therefore is not guilty of murder, whatever other offence it might amount to. That argument is a fallacy, for the two governments in making the treaty were dealing with each other upon the footing that each had at that time recognised laws applicable to the offences enumerated. It is true that the moment a slave puts his foot upon Canadian soil he is free, but the British government never contemplated that he should also be free from the charges of murder, piracy, or arson, though the crime was committed in the endeavour to obtain freedom. The agreement to surrender to each other criminals of certain classes was of course based upon the fact of the persons being criminals by the laws of the country from which they came, provided the evidence of criminality, according to the laws of the place where the fugitive so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed. Whether the prisoner were a slave or not is not the question we have to deal with. We find that slavery is recognised by the laws of the state of Missouri. All that we are called upon to say is whether the prisoner might be legally put upon his trial for murder, provided the homicide had occurred in Canada under the same circumstances as alleged in the depositions.

I do not wish to be understood as meaning to say any thing prejudicial to the prisoner, either upon trial for the offence, or upon the manner in which the case may be dealt with upon demand for surrender, when it comes so to be. I have formed no opinion, either one way or the other, upon the guilt or innocence of the accused. We have as judges only to say whether the evidence of criminality be sufficient according to our laws to put the accused upon trial for the offence of murder. According to the evidence, Diggs had a

lawful right in the state of Missouri to arrest the prisoner, and the prisoner knew it, but yet he resisted, and in the course of that resistance Diggs lost his life. We do not discover that Diggs was using violence or more force than was necessary to accomplish what was in that state a lawful act, and, on the other hand, we find the prisoner not merely resisting the law, but armed with a deadly weapon to aid him in that resistance. Now, take the case of a person authorised by any of our laws to deprive another of his liberty, and homicide committed under the same circumstances as mentioned in the depositions before us, no one can doubt for a moment the evidence would be sufficient for a grand jury putting the accused upon trial for murder. Whether in the course of the trial there might not be circumstances made to appear warranting and justifying the belief that there was no intention to take life, and consequently that the homicide was only manslaughter, is another question, and is one that judges under the circumstances of the present case are not called upon to give any opinion on. The law of the foreign country is plain enough with regard to a certain class of its inhabitants, but because our laws are different with regard to the liberty of that class it cannot in reason and common sense be a sound proposition to advance that such difference in the laws warrants us in ignoring altogether the law of the foreign country, and would justify us in saying that a slave cannot commit murder in attempting to escape. The framers of the treaty never could have supposed that such a proposition was the law by which the treaty itself was to be interpreted, for if it be so, then the treaty, instead of being mutual, would be all upon one side, so far as criminals who have been slaves are concerned.

However much I deplore the necessity of being called on to give any opinion, and however much I may detest and abominate the doctrine that any one portion of the human race has a right to deprive another portion of its liberty, and reduce that class to a state of slavery, yet when called on to explain and interpret an agreement between our own nation and another, and what is the legal effect of it, a duty attaches so sacred that private feelings ought in no manner

to be allowed to warp the mind or pervert the judgment. We must see what each party to the treaty supposed and believed they were negotiating about at the time it was done, and it would be neither fair nor honest to interpret the treaty by the laws of one of the countries, without reference to the laws of the other as they stood at the time the treaty was entered into; and we cannot imagine that either party, in passing laws to enable the treaty to be carried out, supposed that the law of one side was to govern without reference to the law of the other side.

I entertain no manner of doubt that it is proper for the court to refuse to discharge the prisoner, thus leaving him to be dealt with in such manner as His Excellency the Governor-General may be advised; and in doing so it must be understood that the judgment of the court was invoked by the prisoner, not by the government, which may find sufficient reasons, for aught the court has any thing to do with, for not complying with a requisition from the United States.

Prisoner remanded. *McLean, J.*, dissenting.

NOTE.—After the judges had delivered severally their opinions, the Chief Justice, having in the course of his judgment observed upon the course pursued in *Rex v. Marks*, (3 East 166,) directed a rule in the following form to be drawn up and delivered to the sheriff.

# IN THE QUEEN'S BENCH, MICHAELMAS TERM, 24 VICTORIA.

UPPER CANADA, } John Anderson being brought here  
COUNTY OF BRANT. } into court, in the custody of the  
sheriff of the said county of Brant, by virtue of a writ of  
*habeas corpus*, it is ordered that the said writ and the  
return thereto be filed; and upon reading the several infor-  
mations upon oath of William C. Baker, Thomas D. Diggs,  
Benjamin Hazelhurst, J. A. Holliday, a man named Phil.,  
and Benjamin F. Diggs, returned in obedience to a writ of  
*certiorari*, directed to William Mathews, Esquire, one of Her  
Majesty's justices of the peace in and for the county of  
Brant, and upon hearing counsel on both sides, it is ordered  
that the said John Anderson be re-committed to the custody  
of the keeper of the gaol of the said county of Brant, upon



the warrant under which he hath been by him detained, to remain in the common gaol of the said county of Brant, until a warrant shall issue upon the requisition of the proper authorities of the United States of America, or of the state of Missouri, for the surrender of the said John Anderson, to be tried in that state for the murder of one Seneca T. P. Diggs, according to the treaty between Her Majesty and the United States of America, recited in the statute of Canada, passed in the 22nd year of Her Majesty's reign, chapter 89, or until he shall be discharged according to law.

By the court.

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NOTE.—After the decision of this case became known in England, a *Habeas Corpus* was applied for and granted, with some hesitation, by the Court of Queen's Bench there. See 3 L. T. Rep. N. S. 622. Before that writ could be executed in this country, however, the prisoner obtained a similar writ from the Court of Common Pleas here. The case was there rested chiefly upon objections to the warrant of commitment and other proceedings, which were not urged in this application, and that court held these objections fatal and discharged the prisoner, without giving any decision upon the main question. Much discussion arose in the legal and other journals, both here and in England, as to the jurisdiction of the court at Westminster thus assumed, but the discharge of the prisoner rendered it unnecessary to pursue the question further.

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### STEWART AND LESLIE V. CAMERON.

*Ejectment—Acknowledgment of title—Construction of agreement.*

Defendant being in possession of certain premises under one M., executed an instrument under seal, by which he agreed to give up peaceable possession to the plaintiffs, together with certain furniture specified, within one week from the date, upon receipt of \$30. On the following day the plaintiffs tendered to him \$30, which he refused, and they then brought ejectment.

*Held*, that in the absence of any explanation as to the real nature of the transaction, it was properly left to the jury as importing an admission by defendant that the plaintiffs were entitled to possession on paying or tendering the \$30.

EJECTMENT for certain land in the township of Puslinch, part of the front half of lot 26, in the first concession, on which stands the house known as the "Fraser Hotel."

At the trial, at Guelph, before *Hagarty*, J., the plaintiffs called as a witness Donald McKenzie, who swore that one Fraser owned the property, or had owned it: that the defendant on the 14th of March, 1860, was in possession, and keeping the hotel, under one Angus McKenzie, upon some footing not explained at the trial; and that on that day the

defendant signed and sealed an instrument produced at the trial, and proved by McKenzie as the subscribing witness, which was in these words :

"I, Duncan Cameron, of the township of Puslinch, county of Wellington, inn-keeper, do hereby agree to give up peaceable possession of the house and premises leased by me from Angus McKenzie, known as the Fraserville Hotel, together with one box stove, with pipes, seventeen other stove-pipes, ten chairs, and all decanters, glasses, barrels, and other furniture in the house belonging to me, to Hugh Stewart and William Leslie, within one week from the day of the date hereof, upon receipt of the sum of 30 dollars.

"As witness my hand and seal, this 14th day of March, 1860.

"DUNCAN CAMERON,  
[L. S.]

"(Signed,) DONALD MCKENZIE,  
"Witness."

Under this was written :

"I, John Stuart, of the township of Puslinch, do hereby guarantee that the said Duncan Cameron will give up peaceable possession of the above premises, as above described, to the said Hugh Stewart and William Leslie, within the time specified, upon his receiving the sum above mentioned: otherwise I hold myself responsible to the above parties in the sum of 100 dollars damages," (dated 14th March, 1860.)

(Signed,) JOHN STEWART.

(Signed,) DONALD MCKENZIE.

The witness, Donald McKenzie, swore that he was present on the next day after this writing was signed, and saw the plaintiffs tender 30 dollars to the defendant, who would not accept it.

The defendant's counsel objected that this evidence alone did not entitle the plaintiffs to a verdict in this ejectment, for that the instrument, without further evidence, was a mere executory agreement, on which the defendant would be liable to damages if he did not perform it, but did not shew an existing legal right to the possession.

The learned judge thought that, though it was open to the defendant to prove what the real nature and object of the transaction were, yet that in the absence of any such explanation the writing imported an admission of the defendant

that the plaintiffs were entitled to possession on paying and consequently on tendering 30 dollars, which sum they had tendered within the time limited.

The jury found for the plaintiffs, leave being reserved to move for a nonsuit.

*M. C. Cameron* obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial for misdirection.

*Adam Crooks* shewed cause, and cited *Doe dem. Hudson v. The Leeds and Bradford R. W. Co.* 16 Q. B. 796.

ROBINSON, C. J., delivered the judgment of the court.

We do not think that the writing signed by the defendant does necessarily and certainly import an acknowledgment by him that the plaintiffs were *entitled* to possession on the thirty dollars being paid. It is capable of being otherwise explained, but in the absence of any explanation we think the learned judge at the trial was not wrong in submitting it to the jury as leading naturally to that inference; and as the defendant, though he has moved for a new trial, has not laid before us any affidavit explaining the transaction, and shewing that the conclusion drawn by the jury is inconsistent with the object of giving that writing, we think the rule should be discharged.

Rule discharged.

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### REGINA V. PAH-MAH-GAY.

#### *Heathen witness—Admissibility.*

On a trial for murder an Indian witness was offered, and on his examination by the judge it appeared that he was not a christian, and had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared however that he had a full sense of the obligation to do so, and that he and his tribe believed in a future state, and in a Supreme Being who created all things, and in a future state of rewards or punishment according to their conduct in this life. He was then sworn in the ordinary way.

*Held*, that his evidence was admissible.

INDICTMENT for the murder of John, *alias* Nish-Kay-Wassey.

At the trial, at Sandwich, before *Draper*, C. J., Esh-



quay-gonabi, an Indian of the Pottawattomie nation, a pagan, was called as a witness for the Crown, and gave evidence that the prisoner in the night, in a camp, when only he and the deceased and witness were present, shot deceased in the back and killed him. They both were very drunk, the prisoner the most so.

This witness was sworn in the common way on the Gospels. After he was sworn, the learned Chief Justice found, by questions put to him through an interpreter, that he had full sense of the obligation to speak truth, but that he was not a christian, and had no knowledge of any religious or other ceremony or form binding a person to speak the truth, or of any form of asseveration or of appeal to a Superior Power to attest his veracity, or of imprecating punishment upon himself if he should assert what was false. He and his tribe believed in a future state, and in a Supreme Being, who created all things; and in a future state, where the measure of success in hunting and of happiness would depend upon their conduct in this life.

The person who arrested the prisoner asked him how he came to kill the other, and he answered in English, "He made me mad, quick shoot him!"

Upon this trial he said he was drunk and knew nothing about it.

He was convicted, and sentenced to death, to be executed on the 22nd of December, 1860.

But the learned Chief Justice reserved for the opinion of this court, whether, under the circumstances, he was right in admitting the testimony of the Indian witness.

*Prince* and *R. A. Harrison*, for the Crown, referred to *Omichund v. Barker*, 1 Sm. Lea. Cas. I. 195; *Tay. Ev. Sec.* 1252; *Regina v. Entrehman and Samut*, 1 Car. & Marsh. 248; 6 & 7 Vic., ch. 22, imp. act.

ROBINSON, C. J., delivered the judgment of the court.

Upon the testimony of the Indian boy, there was nothing in the facts to make the killing less than murder.

The evidence of the Indian witness, whose admissibility is

in question, was indispensable to the support of the case for the prosecution.

The admission by the prisoner, as proved by the constable who arrested him, though it went the length of acknowledging that he shot the deceased, yet would not enable the jury to satisfy themselves of the degree of his offence. The deceased Indian, brother of the prisoner, he said had made him mad, and he shot him quick. What provocation the prisoner had received does not appear. His admission must necessarily be taken altogether, and the jury can only conjecture whether the Indian who was killed being also drunk, may not have been engaged in some altercation during which blows were struck. It is no doubt a principle, that every wilful killing of a man by another is to be looked upon as having been malicious, until it shall be shewn that it was not. But we should think it hardly safe to apply this general principle under what we see and know of the present case.

We assume, then, that in order to support the conviction for murder the testimony of the Indian lad was necessary, and that the evidence would be insufficient without it. Then was that testimony admissible?

That brings up for consideration the effect of the decision of the learned judges in the case of *Omichund v. Barker*, (1 Atk. 21.)

Looking at the report of the circumstances under which the question has arisen in the present case, if we were to judge of *Omichund v. Baker* by the references to it which are to be found in treatises on evidence, and by the mention in digests of the principles which that case is supposed to have established, we should conclude, we think, that this Indian witness, not being a christian, was not admissible, because being a heathen, he was sworn in the ordinary manner of other witnesses, and not according to any ceremony which is in use in the tribe or nation to which he belonged. But after reading the opinion of Lord *Hardwicke*, and the two eminent judges who sat with him, as reported by Atkyns in *Omichund v. Barker*, and in the very elaborate judgment delivered by Lord Chief Justice *Willes*, and reported by himself in *Willes* 549, we have come to the conclusion that the

evidence of the Indian witness was rightly allowed to go to the jury.

He believed in a Supreme Being, who created all things, and in a future state of rewards or punishments, a life after this in which those who have died here will be more or less happy, according to their conduct on earth.

He evinced a strong sense of the obligation to speak truth, and in taking the oath, which was explained to him, he invoked in the usual terms the Supreme Being so to aid him as he should speak the truth. There was an absence, it is true, of any ceremony, such as breaking a saucer by a Chinese witness, or touching a table with the forehead, intended in each case to bind the conscience of the witness, according to a custom common among them. If the witness had belonged to a nation or tribe that had in use among them any particular ceremony, which was understood to bind them to speak the truth, however strange and fantastic the ceremony might seem to us, it would have been indispensable that the witness should have been sworn, if we may use the term, according to such ceremony, because all should be done that can be done to touch the conscience of the witness according to his notions, however superstitious they may seem.

Here there was no ceremony of the kind known to the witness or the interpreter, and there was therefore no omission of any thing that could have given additional solemnity in the mind of the witness to the statement he was about to make. The oath upon the Gospels had no signification in his case. He is not a christian, and has no belief in them; but he believed in a Good Spirit or Supreme Being, and in a future state of rewards or punishments. It is by no means necessary that his idea of a Great Spirit should agree with a christian's knowledge of God. His holding the Testament in his hand, or kissing it, did at least no harm, and when, after invoking God or the Supreme Being, he made his statement, he did all that a Gentoo, or Turk, or Chinese, could do, except the going through some ceremony, which he could not do, because none was known in his tribe that was connected with the position of a witness, or supplied any additional obligation upon him to adhere to truth.



After attentively considering the arguments and judgments which we have referred to, it appears to us that they do go the length of supporting the admission of this witness, as he was admitted.

We think the conviction should be affirmed.

Conviction affirmed.

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ANNE CARLISE V. GEORGE HOSHEL.

*Bond for purchase money of land—Equitable plea, want of title—Total failure of consideration not shewn.*

To an action of debt on bond for the payment of £350 and interest, by instalments, defendant pleaded, as an equitable defence, that the bond was given for the purchase money of a lease, which the plaintiff then held of a certain lot, and on condition that she should also procure from the rector of S. a lease of a certain other lot and assign it to defendant; and that the plaintiff had no term or interest in either lot.

*Held*, that the plea was bad for not averring that defendant had not gone into possession under his purchase, and therefore not shewing a total failure of condition.

The plaintiff, however, did not demur, but took issue, and upon the evidence obtained a verdict, which the court refused to disturb.

DEBT on bond, in a penalty of £900, conditioned to pay to the plaintiff £350 in certain instalments, and to pay interest half-yearly on the whole sum due. The claim was for three half-years' interest.

*Plea*, setting up that the bond was given by defendant for the purchase money of a certain lease, which the plaintiff then held of a certain lot in the village of Stamford, and on condition that she should also procure from the rector of Stamford a lease of a certain other lot, and should assign such lease to the defendant, and averring that the plaintiff had no term or interest in either lot; and so defendant set this up as an equitable defence, alleging a total want of consideration.

The plaintiff took issue on the plea.

At the trial, at Niagara, before *McLean*, J., the plaintiff got a verdict, which *McMichael* moved to set aside for misdirection, and on the law and evidence.

ROBINSON, C. J., delivered the judgment of the court.

The plea was bad as an equitable defence, and should have

been demurred to, for it did not aver that the defendant had not gone into possession under his purchase from the plaintiff, and was not enjoying possession at the time of the action brought, and it is proved that he did obtain possession from the plaintiff and still holds it. There is, therefore, not a total failure of consideration, and the defendant cannot treat the contract as rescinded, for the parties cannot be put in *statu quo*. If the defendant has any thing to complain of, his remedy is on the bond which he holds from the plaintiff, or possibly in a Court of Equity, which could give relief on terms against this action.

But the evidence shews that the plea is really untrue, for that the plaintiff did assign to the defendant the lease which she held of the one lot, as she undertook to do; and has procured for him a lease of the other lot, such as she could get, and such as the plaintiff declared he would be willing to accept.

Rule refused.

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### GARRETT, EXECUTOR OF TAYLOR V. THE PROVINCIAL INSURANCE COMPANY.

*Insurance—Agreement to keep water on the premises—Effect of non-performance.*

Where by a policy of insurance the insured agreed to keep twelve pails full of water on each flat of the building during the continuance of the policy, and he neglected to do so, but it appeared that the loss was not in any way affected by his default:

*Held*, that nevertheless he could not recover.

This was an action on a policy of insurance against fire, effected by testator with the defendants upon a steam saw mill.

A special case was stated, and the objection mainly relied upon against the plaintiff's recovery was that the insured did not comply with the following condition inserted in the policy: "the assured hereby agrees to keep twelve pails full of water on each flat of said mill during the continuance of this policy." This was written in the body of the policy, and there was no mention of it in any of the printed forms or conditions endorsed on the policy.

The affidavits put in as part of the special case shewed

that the number of buckets required by the policy were not in the mill when it was burned ; but that they could have been of no use had they been there, as the fire was not discovered until it was so far advanced as to make it impossible to enter the building.

*C. S. Patterson*, for the plaintiffs, cited *Add. on Cont.* 593 ; *Sillem v. Thornton*, 3 E. & B. 889 ; *Angell on Ins.* secs. 145, 150.

*Duggan*, Q. C., contra, cited *Arn. on Ins.* 627, 629, 632 224 ; *Cameron et al. v. The Monarch Insurance Co.* 7 C. P. 212 ; *Cameron et al. v. The Times and Beacon Insurance Co.*, *Ib.* 234 ; *Alderman v. West of Scotland Ins. Co.* 5 O. S. 37 ; *McFaul v. The Montreal Inland Insurance Co.* 2 U. C. R. 59 ; *Lampkin v. Western Insurance Company*, 13 U. C. R. 237, 361 ; *CinquMars et al. v. Equitable Insurance Co.* 15 U. C. R. 143.

ROBINSON, C. J., delivered the judgment of the court.

The engagement by the assured to keep twelve pails full of water on each flat of the mill during the continuance of the policy, is a condition on which the insurance was effected, and is termed a promissory warranty.

The performance of it is necessary, we think, to the right to sue upon the policy, and when such a condition is not observed the insured loses his remedy upon the policy, even though it should not appear that the failure to observe that condition occasioned the loss.

The effect of what is shewn is that the defendants agreed for a certain premium to insure the mill, provided the insured would always keep in the mill, at hand, certain means of extinguishing any fire that might break out. If the insured had declined to come under that condition, the defendants might either have exacted a higher premium or declined the risk.

We think the law compels us to hold that the plaintiff lost the benefit of his policy by the failure on his part, which was proved and is not denied.

Judgment for defendants.



## BROWNE V. THE BROCKVILLE AND OTTAWA RAILWAY COMPANY.

*Collision at crossing—Neglect to give signals and to construct crossing on a proper level—Limitation of action therefor—Consol. Stat. C. ch. 66, sec. 83—Train under control of contractor, not of defendants.*

The plaintiff sued defendants for injury caused to himself and his waggon by collision with their train at a railway crossing, owing to a neglect to sound the whistle or ring a bell on their approach as required by the statute, and to improper construction of the railroad, being more above the level of the highway than the act allowed. The jury having found for the plaintiff:

*Held*, that the injury, if arising from either cause alleged, was sustained "by reason of the railway:" that it was not a case within the exception as to "continuation of damage;" and that the action having been brought more than six months from the accident, was therefore too late.

The defendants had contracted with one P. to ballast their road, and the train in question was laden with ballast, under the charge of men employed and paid by him, the defendants having no control, except that by his contract he was bound to keep these trains from interfering with the passage of other trains along the road.

*Quære*, whether this would have relieved the defendants from liability.

The plaintiff brought an action against the defendants, declaring in the first count for injuries to the plaintiff's person, and for breaking the plaintiff's waggon and harness, stating, that the defendants' railway crossed a public allowance for road between lots six and seven in the ninth concession of Montague: that the defendants, their servants and agents, were driving, employing and using a locomotive engine and a train of carriages, upon the railway, across the said highway: that the plaintiff was lawfully passing along the highway in his waggon, in charge of his train of horses and other property: that it was the duty of the said defendants, their servants and agents, to furnish the said locomotive engine with a bell of at least thirty pounds weight, or with a steam whistle, and in driving or using the said locomotive engine upon the railway across the said highway, to ring or cause to be rung such bell, or to sound or cause to be sounded such whistle, at the distance of at least eighty rods from where the railway crossed the said highway, and to have kept ringing the said bell, or sounding the said whistle, at short intervals until the locomotive engine had crossed the highway; yet that the defendants and their servants, disregarding their duty in that behalf, did not ring or cause to be rung the said bell, and did not sound or cause to be

sounded the said whistle, at the distance of eighty rods from the crossing, and did not ring or sound at short intervals till the locomotive engine had crossed the highway. By reason of which omission the said engine and train of carriages came in contact with the plaintiff, his horses and waggon, while they were so lawfully on the said highway, crossing the said railway track, the plaintiff not being then or before aware of the approach of the said train, and upset and wholly destroyed the plaintiff's waggon and broke the harness, and threw the plaintiff out of the waggon, and thereby broke one of his legs, and crushed one of his feet, &c., alleging special damage from the plaintiff being in consequence disabled from working at his trade of a blacksmith, and from the expenses of cure, &c.

It was averred that plaintiff's horses were injured by the collision, but it was proved that they were not injured.

In the second count the plaintiff set forth that the defendants constructed their railway across the said highway, not carrying the same over by a bridge or under the highway by a tunnel, wherefore it became their duty so to have constructed and maintained their railway across the said highway, that it should not at the crossing rise more than one inch above, or sink more than one inch below the level of the highway; yet that the defendants, in disregard of their duty, so constructed and maintained their railway, that it was raised at the crossing more than one inch above the highway, whereby the plaintiff, who was lawfully passing along the highway with his waggon, &c., was obstructed and unable to pass along the highway, and was entangled and caught on the railway, where it crossed the highway; and that a locomotive and train of carriages of the defendants, then being employed upon the railway, and in charge of the defendants, their servants and agents, came, without the fault or negligence of the plaintiff, violently into contact with his horses and waggon, and upset and destroyed his waggon, and injured the plaintiff, &c., (as in the first count), laying special damage.

In a third count the plaintiff attributed the accident to the effect of the two causes combined, namely, the omission to

ring or sound the whistle, and the being obstructed in the crossing by the improper manner in which the crossing had been constructed; that is, its being raised above the highway more than the statute directed.

In a fourth count the plaintiff complained that the defendants, by their servants, so negligently and unskilfully drove and managed their engine and train upon the railway, which the plaintiff with his horses and waggon was then lawfully crossing, that the engine and train came into collision with the plaintiff's waggon and horses.

The defendants pleaded not guilty, by statute, referring to 16 Vic., ch. 106, sec. 2; Consol. Stats. C., ch. 66, sec. 83.

This action was brought on the 20th of June, 1860, and the accident occurred on the 17th of September, 1859.

At the trial, at Perth, before *Robinson*, C. J., at the conclusion of the plaintiff's case the defendants objected that the action should have been brought within six months from the time of the damage or injury sustained.

And further, that it was not proved that the defendants had any concern with this particular railway, or with the train which ran against the plaintiff's waggon.

The plaintiff, as to the action being too late, contended that it was in time, though clearly after six months, the case coming within the exception of continuation of damage, and the damage to the plaintiff in fact continuing even up to the time of the trial.

The learned Chief Justice considered that this was not a case of continuation of damage within the meaning of the exception in the 83rd section of Consol. Stats. C., ch. 66, certainly not as regarded the waggon and harness, and he doubted whether the injury to the person must not also be referred to the time of the accident. He allowed the case to proceed, however, reserving leave to the defendant to move for a verdict or a nonsuit upon that objection.

When the defendants' evidence had been given, it appeared, in the first place, to be doubtful whether the bell had been rung or the whistle sounded as the statute requires; that is, beginning when the train was at least eighty rods distant from the crossing, and continuing to ring or



sound at short intervals until the engine had crossed the highway. Upon that point the evidence was contradictory, and there was much reason to believe that the direction of the statute was not properly complied with.

With regard to the manner in which the crossing had been constructed, it was plainly proved that, although it was intended to cross the highway at a level, it was in fact raised more than a foot above the highway, without any proper approaches being made up to it on either side from the highway, so as to make it extremely inconvenient, and with a heavily laden team, or with restive horses, almost impossible to get from the highway upon the track. It had been complained of to the company both by individuals and by the county council, but it was allowed to remain in this very inconvenient state till this accident happened, since which time it had been put in a proper condition.

If the accident should be found by the jury to be owing to any neglect in the conduct of the train which came in contact with the waggon, the defendants contended that they could not be held liable on account of such neglect, because that train was not under the management at that time of themselves, their servants or agents.

The company had entered into a contract with one Phelps, to construct and ballast the railway bed, and they had allowed him the use of a locomotive and a train of ballast cars, with which he was taking ballast along the railway. The use of the train was not otherwise controlled by the company than that Phelps was obliged by the agreement between them to take care and keep the train from interfering with the passage of other trains along the railway. There was no servant or agent of the company employed in any capacity upon the train. All the men were employed, and paid, and directed by Phelps, and those under him. That was a fact not disputed at the trial.

It appeared to the learned Chief Justice that the company could not be liable for the negligent manner in which that train was driven, by omitting to give proper signals before coming to a road crossing; unless indeed it could be held that the facts brought the case within the principle of such cases

decided in England, in which the giving the use of the company's trains to perform work upon the railway had been considered as a working of them by themselves for the consideration of getting the work done upon lighter terms, so that in such sense the contractors were their servants using the train for their benefit; but as none of the company's servants were in charge of the train, or employed upon it, he thought it would not be found that any such case would apply.

The jury were requested to find, first, whether the plaintiff brought the accident upon himself, or at least contributed to it, from a want of ordinary care and prudence in going upon the railway as he did, for there was some evidence to that effect; secondly, if not, then whether the accident was occasioned by a want of care in conducting the train; thirdly, or whether it was occasioned by the defects in the crossing, which disabled the plaintiff from crossing in time to avoid the train, after he was aware of its approach; and, fourthly, what damages they thought the plaintiff had sustained, supposing the company to be liable.

The jury found that the accident was not occasioned by any want of care or fault of the plaintiff, but from a want of proper signals being given, according to the statute; and also from the defective state of the crossing; and they estimated the damages at £200.

*Crombie* obtained a rule *nisi* to enter a nonsuit on the leave reserved, on the ground of the action not having been brought within the time limited, six months; or for a new trial upon the law and evidence. The defendants, in case the plaintiff should be found entitled to recover, did not contend that the damages were excessive.

*Prince*, shewed cause, and cited Consol. Stats. C., ch. 66 secs. 83, 104; 16 Vic., ch. 106; *Renaud v. The Great Western R. W. Co.*, 12 U. C. R. 408; *Ellis v. The Sheffield Gas Consumers' Co.*, 22 Eng. Rep. 198; *Palmer v. The Grand Junction R. W. Co.*, 4 M. & W. 749; *Carpue v. The London and Brighton R. W. Co.*, 5 Q. B. 747; *Garton v. The Great Western R. W. Co.*, 33 L. T. Rep. 240; *Shields v. The Grand Trunk R. W. Co.* 7 C. P. 111.

*Crombie*, contra, cited *Reedie v. The London and North Western R. W. Co.*, 4 Ex. 244; *Steel v. The South Eastern R. W. Co.* 16 C. B. 550; Addison on Torts, 258.

ROBINSON, C. J., delivered the judgment of the court.

Upon the question whether the action has not been brought too late, several English decisions have been cited. These turn upon the language of the special English railway acts, on which the cases depended. The words of the protective clause in those statutes are "no action shall be brought for any thing done or omitted to be done in pursuance of this act," &c.

The words of our statute, Consol. Stats. C., ch. 66, sec. 83, are "all suits for indemnity *for any damage or injury sustained by reason of the railway*, shall be instituted within six months next after the time of such supposed damage sustained, or if there be continuation of damage, then within six months next after the doing or committing such damage ceases, and not afterwards."

It appears to us that our statute is in its effect as comprehensive as the English, though the forms of expression used are very different.

As to the cause of damage arising from the improper or imperfect construction of the crossing, that does certainly come expressly within the words in our statute. It was a damage or injury sustained by reason of the railway: that is, from its forming a wrongful obstruction to the highway, not being as nearly on a level with it as the law required. Clearly the action for that injury should have been brought within six months.

As to the other ground of complaint, the omitting to give the proper signals of approach, that does not come expressly within the words of the clause, because it may be said that the damage was not sustained by reason of the railway, but rather by reason of the manner in which the carriages on the railway were driven; but we think the substance and effect are the same in the one case as the other. "By reason of the railway," is a very comprehensive expression, and we think extends to an injury sustained on the railway by reason of the use made of it.



If this be the correct construction to be given to the limitation clause, it makes an end of this case, for we think this not such a case as comes within the exception which gives an extension of time where there has been a continuation of damage. All here, we think, must be referred to the unlawful act which occasioned the injury. We mean the unlawfully driving the train up to the station, without giving the proper signals. No second action could be brought by reason of a subsequent damage or continuing damage.

This is independent of the other objection, that the company were not responsible under the circumstances for the negligent driving of this train, as to which we are not satisfied that the law would not be found in favour of the defendants, but we give no formal opinion on that point.

Rule absolute for nonsuit.

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#### HARD V. PALMER.

*Promissory note—Death of payee in foreign country—Endorsement by his administrators there—Right of endorsee to sue here.*

Where a note was made by defendant, a resident of Upper Canada, payable to P., who died in the State of New York, having the note then in his possession there: *Held*, that his administrators appointed in that State might endorse the note so as to enable the endorsee to sue upon it in this country, without their having administered here.

Declaration on a promissory note made by defendant, payable to P. or order, on demand, averring the death of P., and that J. P. and C. P. were duly appointed his administrators, and duly endorsed to the plaintiff: that when the note was made, and from thence until his death, P. resided in the State of New York: that the plaintiff, at the time of the endorsement to him, and from thence hitherto lived there also; and that at the death of said P. the note was in the said State.

*Plea*, that the note was made at Kingston in the united counties of F. L. & A., in Upper Canada: that defendant at the death of said P., and before and at the time of the making of said note had, and still has his domicile there: that said note at the death of said P. was *bona notabilia* in said united counties: that said appointment of J. P. and C. P. as administrators was made only by a tribunal of said State, and that they were never appointed by the proper authority in Upper Canada.

*Held*, on demurrer, that the plea shewed no defence.

DECLARATION on a promissory note for \$2000, made by defendant on the 24th of February, 1849, payable to Joseph L. Palmer or order, on demand. And the plaintiff averred that the said Joseph L. Palmer had departed this life, and that Joseph R. Palmer and Charlotte M. Palmer were duly

appointed to administer all and singular the goods and chattels which were of the said Joseph L. Palmer at the time of his death, and that the said Joseph R. Palmer and Charlotte M. Palmer duly endorsed the said note to the plaintiff, but that the defendant did not pay the same; and further, that at the time the said note was made, and from thence until his death, the said Joseph L. Palmer resided in a foreign country, to wit, in the State of New York, one of the United States of America; and that he, the plaintiff, at the time of the endorsement to him as aforesaid, and from thence hitherto, had resided and did still reside in a foreign country, to wit, in the State of New York, one of the United States of America; and that at the time of the death of the said Joseph L. Palmer, the said note was in the State of New York, one of the United States of America.

*Plea.*—That the said note was made at the city of Kingston, in the united counties of Frontenac, Lennox and Addington, in Upper Canada, and that the defendant at the time of the death of Joseph L. Palmer in the declaration mentioned, and before and at the time of the making of the said note, and from thence hitherto, resided and had his domicile and place of abode in the said city of Kingston, in Upper Canada, and that the said note at the time of the death of the said Joseph L. Palmer was *bona notabilia* in the said united counties of Frontenac, Lennox and Addington; and that the said appointment of J. R. Palmer and Charlotte M. Palmer to administer, in the declaration mentioned, was and is an appointment only by a court, officer, or tribunal of a certain foreign State, to wit, the State of New York, one of the United States of America; and that the said J. R. Palmer and Charlotte M. Palmer never were appointed by any surrogate or probate court, or other proper authority in Upper Canada, to administer, and never had any authority in Upper Canada to administer, all and singular or any of the goods or chattels, rights or credits, which were of the said Joseph L. Palmer at the time of his death.

*Demurrer*, on the grounds—1. That the said note was not at the time of the death of the said Joseph L. Palmer *bona*

*notabilia* in the united counties of Frontenac and Lennox and Addington.

2. That the said plaintiff received by the endorsement of the said executors, under the authority vested in them by the appointment mentioned in the declaration, a good and valid legal title to the note mentioned, sufficient to entitle him to maintain an action here in his own name.

3. That it is not necessary to support this action that the executors who endorsed this note to the plaintiff should take out administration in the united counties of Frontenac, Lennox and Addington.

*Prince* and *Kirkpatrick* for the plaintiff, cited *Stor. Confl. L.* secs. 358, 359, 514, 517, 555, 556; *Cumming v. Baily*, 6 Bing. 371; *Barrett v. Barrett*, 8 Greenl. 353; *Huthwaite v. Phaire*, 1 M. & Gr. 159, 164; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Alivon v. Furnival*, 1 Cr. M. & R., 277; *Westl. on International Law*, sec. 297; *McNeilage v. Holloway*, 1 B. & Al. 218; *Kent. Com.*, vol. III., Lec. 44, p. 88; *Rand v. Hubbard*, 4 Metc. 252, 258-9; *Harper v. Butler*, 2 Peters 239; *Trecothick v. Austin*, 4 Mason 16; *Wms. on Exrs.* 1016; *Shep. Touch.* 496; *Chy. on Bills* 2, 3.

*Richards*, Q. C., contra, cited *Wms. on Exrs.* I., 279, 320, 321; *Whyte v. Rose*, 3 Q. B. 493; *Stearns v. Burnham*, 5 Greenl. 261; *Stor. Confl. L.*, secs. 513, 519.

ROBINSON, C. J., delivered the judgment of the court.

This plea brings up a question which one might suppose could hardly at this time be unsettled, but is certainly not so clear on the authority either of text books or decided cases as to leave no room for doubt.

The point is whether a promissory note having been made in this province, payable to one Joseph L. Palmer, by the defendant, who at the time was, and always since has been, resident in Upper Canada, can be sued upon here by the indorsee of the administrators of the payee; the fact being that the payee died in the United States of America, namely, in the State of New York, having this note then in his possession, and the administrators having no other title to



represent the deceased payee than by letters of administration granted to them in the State of New York, which administration had been granted to them in that State before they endorsed the note to the plaintiff there.

If the endorsement of the note by the administrators of the payee to the plaintiff under these circumstances, enables the plaintiff to sue upon the note in this province, then the plea is no defence, and the plaintiff is entitled to judgment.

In our opinion the administrators could legally transfer the note in the State of New York by endorsing it and delivering it to the plaintiff, although they had not administered to the estate of the payee in Upper Canada.

And if this be so, then undoubtedly the endorsee can sue in his own name as he has done, though if the administrators had not parted with the note, and were suing upon it here as representatives of the payee, they would no doubt have had to shew administration granted to them by the proper authority in this Province.

The whole question therefore is, whether the administrators could or could not make the note the property of the plaintiff by endorsement and delivery, without first taking out administration in Upper Canada, on account of the maker of the note being resident here, which makes the debt due upon it *bona notabilia* in this province, and not in New York.

In our opinion the administrators could legally transfer the note to the plaintiff as they did, *i.e.*, in New York, and without having taken out administration in Canada.

There is no question that the plaintiff not suing himself in a representative capacity, but in his own right, was under no necessity to shew administration granted to the endorsers before they transferred the note.

The case of *Rawlinson v. Stone*, (3 Wils., 1, S. C. Nom. *Robinson v. Stone*, 2 Str. 1260,) fully settles that point. The only question can be whether the note is his.

That the note upon which this defendant was debtor was by our law *bona notabilia* only where the debtor resided is clear, but that is only material, or rather would have been under the former state of our law, for determining from which jurisdiction in this province the administration should issue.

The note being in New York when the payee died would be assets there, and the administrators could doubtless receive payment of the debt either in New York or in Upper Canada; though if they had kept the note, and had been obliged to bring an action here, where the debtor lived, in order to collect it, they would, as we have already stated, have had to take out administration in Upper Canada, in order to give them a *locus standi* in our court.

If the note had been payable to bearer, they could surely have transferred it in New York by delivery, without having to take out administration in this province in order to give them that right.

The inconvenience would be intolerable if administrators or executors in a foreign country could not negotiate such securities upon which persons in England were debtors, without first taking out administration in England, and this too in cases where the necessity might only arise in consequence of the debtor having removed to England after making the note. In Story's Conflict of Laws, (4th Ed., sec. 358-9, note,) this point is more particularly treated of than I have found it elsewhere—"A negotiable note," he says, "was given by a debtor, resident in Maine, to his creditor, resident in Massachusetts. After the death of the creditor, his executrix, appointed in Massachusetts, endorsed the same note in that state to an endorsee, who brought a suit as endorsee against the maker in the State Court of Maine. The question was, whether the note was, under the circumstances, suable by the endorsee, and the court held that it was not; for the court said that the executrix could not herself have sued upon the note without taking out letters of administration in Maine, and therefore she could not by her endorsement transfer the right to her endorsee."

That is a case precisely like the present, and the decision was against the right to recover.

Mr. Justice Story intimates, however, his dissatisfaction with the decision, remarking that "In either state the creditor might certainly, in his life time, by his endorsement, have transferred the property in the note to the endorsee; and as clearly his executrix could do the same; for it is en-

tirely well settled that an executor or administrator can so transfer any negotiable security by his endorsement thereof. If then by the transfer in Massachusetts the property passed to the endorsee, it is difficult to perceive why that transfer was not as effectual in Maine as in Massachusetts; and by the law of both states an endorsee may sue on negotiable instruments in his own name."

He cites a later decision of the same court, which he looks upon as being in accordance with his opinion, and he refers to a recent decision in the supreme court of the United States, as being "founded upon the doctrine that an assignment by an executor of a chose in action in the state where he is appointed, and which is good by its laws, will enable the assignee to sue in his own name in any other state, by whose laws the instrument would be assignable, so as to pass the note to the assignee, and enable him to sue thereon."

With no authority to the contrary cited from any English decision we venture to rely on the soundness of this view of Mr. Story.

In our opinion the plaintiff should have judgment on this demurrer.

Judgment for the plaintiff on demurrer.

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### NORTON V. SMITH.

*Dower—Conveyance and mortgage back on same day for purchase money—Improvements since husband's death—Mode of estimating damages and yearly allowance.*

A. conveyed land to B. in 1833, and on the same day took back a mortgage for the whole purchase money. B. paid nothing either for principal or interest, and in 1840 re-conveyed absolutely to A., the land being then vacant. His wife did not join in either the mortgage or re-conveyance, and eighteen years after his death brought an action for her dower, against the tenant, who had purchased from A. soon after he received the re-conveyance, and had erected valuable buildings.

It was agreed that if entitled to dower she should be paid a yearly compensation in money, to be determined according to the decision of the court. *Held*, following *Potts v. Meyers*, 14 U. C. R. 499, that the widow was entitled to dower.

*Held*, also, that the damages, to which she was entitled only from the time of demand made, should be calculated upon the average value of the land during that period, irrespective of improvements made by the tenant; and that the allowance to be paid to her should be estimated upon a computation of one-third of the occupation value of the ground only, without the buildings.

This was an action of dower brought by the demandant,



as widow of Asa Norton, to recover her dower in town lots Nos. 15 and 16, on Dundas street, in the first range of the town of Whitby, in the county of Ontario, containing one-half of an acre.

By the consent of the parties, and by the order of *McLean, J.*, dated the 21st of November, 1860, according to the Common Law Procedure Acts, the following case was stated for the opinion of the court without any pleadings:

#### CASE.

1. It is admitted that a demand of dower was duly served by the above-named demandant, who is the widow of the said Asa Norton, on the tenant, George Smith, who is the owner in fee of the said land, on the 21st of May, 1860.

2. That the said Eliza Norton was the wife of the said Asa Norton, on and before the 18th of January, 1833.

3. That Asa Werden was the owner in fee of the premises, and by deed, dated the 18th of January, 1833, in consideration of the sum of £30, conveyed the said land in fee to the said Asa Norton: that said deed was duly registered in the proper registry office, on the 7th of February, 1833.

4. That Asa Norton on the same day re-conveyed to Asa Werden, by way of mortgage, for the whole purchase money.

5. That Asa Norton never paid any part of the purchase money or interest, and by deed, dated the 28th of August, 1840, re-conveyed the said land absolutely to Werden in fee.

6. That the said demandant did not bar dower in either the mortgage or re-conveyance.

7. That subsequent to the deed to said Norton, and prior to the re-conveyance to Werden, said Norton had fenced the lots and cultivated potatoes in them.

8. That Norton died on the 6th of June, 1842, at which time the premises were vacant lots, worth about £125.

9. That after the death of Asa Norton, Werden, by deed, dated the 1st of May, 1843, conveyed to the tenant, George Smith, in fee, who built a house and other buildings on the lots, which he occupied as an hotel, and which are still so occupied by his tenant, at a yearly rental of £187 10s., or thereabouts.

10. That about one-third of the said lots is still uncovered by buildings.

The demandant contends that she is entitled to have as-

signed to her one-third in value of the premises in their present improved state.

The tenant contends that the demandant's husband had no sufficient seisin of the premises to entitle her to dower.

And that, if entitled to dower, she is only entitled to have assigned to her one-third of the premises as they were at the death of her husband, or one-third in value calculated as of the date of her husband's death, or one-third of the present value of the land irrespective of buildings.

The questions for the opinion of the court are—1. Whether the demandant is entitled to dower in the said lands. 2. If the court should be of opinion that the demandant is entitled to dower, then, whether she is to have one-third in present value assigned to her, as the demandant contends, or whether she is to have one-third in value calculated as of the date of her husband's death, or one-third of the present value irrespective of the buildings, as the tenant contends.

If the court shall be of opinion that the demandant is entitled to dower in the said lands, then judgment shall be entered for the demandant and costs of suit; and she is to be paid a yearly money composition for her dower, to be estimated by a referee, to be chosen by the parties, or by two referees, one chosen by each of the parties, or an umpire chosen by such referees, as the case may be, should the parties fail to agree upon one person; such estimate to be based on the decision of the court on the second point.

If the court shall be of opinion that the demandant is not entitled to dower, then judgment of nonsuit, with costs of defence, shall be entered up for the defendant.

The costs of reference and award to be in the discretion of the referee, referees, or umpire, so to be appointed.

*M. C. Cameron*, for the demandant, cited *Potts v. Meyers*, 14 U. C. R. 499; *Ruttan v. Levisconte*, 16 U. C. R. 495; *Doe dem. Riddell v. Gwinnell*, 1 Q. B. 683.

*C. S. Patterson*, and *E. Blake*, contra, cited *McDonald v. McIntosh*, 8 U. C. R. 388; *Rex v. Inhabitants of Northweald Bassett*, 2 B. & C. 724; *Dart V. & P.* 486; *Robinett v. Lewis*, *Dra. Rep.* 272.

ROBINSON, C. J., delivered the judgment of the court.

I had a strong opinion against the correctness of the judgment pronounced by the majority of this court in *Potts v. Meyers*, (14 U. C. R. 499,) but we shall follow it, of course, so long as it remains unreversed.

The present is a case which illustrates very strongly, however, the unreasonableness of a claim to dower by the widow of a vendee, who before he had paid a penny of the purchase money, *and on the same day that he took the conveyance of the estate*, mortgaged it back to the vendor for the whole price.

The lien for the price to the full extent had ever since continued, till the vendee, finding himself unable to pay for the land, or being unwilling to do so, re-conveyed it to the person from whom he bought it; in other words, he gave up the land, which he had never paid for, and had never built on or improved. He died two years afterwards, and in 1842, the person who had thus taken back his land sold it to the tenant in this action, who, besides paying for it, as we may suppose, built a tavern and other buildings upon it, which he now rents at £187 10s. a year. The demandant's husband was only to have paid £30 for the fee in all the land, and of that sum he had paid no part whatever.

The widow, after delaying to bring her action for eighteen years, now sues for her dower, and admitting that her right to dower is for the present established by the judgment given in *Potts v. Meyers*, the further question submitted to us is, according to what rule of computation the value of her claim is to be estimated.

It would not be easy, we believe, to select a point in the range of English jurisprudence which it would be more difficult to settle clearly upon authorities.

*Doe dem. Riddell v. Gwinnell*, (1 Q. B. 682,) may be looked upon as evidence of the view at present taken of the law on this point in England, though it stands certainly opposed to very much that had been laid down before in books of the highest authority. On this point it is well to refer to the view of the law stated by Mr. Rawle, in his treatise upon Covenants for Title, pp. 333 to 339, and we must also look back to the case cited from our own court, *Robinett v. Lewis*, (Dra. Rep. 272,) by which we shall abide until a better rule is prescribed to us by authority by which we shall be bound.

We assume that the widow can recover only for six years arrears of dower, or rather in this case only from demand



made; and her damages, we think, should be calculated upon the average value of the land through that period, irrespective of improvements put on by the tenant, who stands in the place of the alienee of the husband, and in reality in a much more favourable position than the alienee can generally stand, for he is alienee of one who held a lien upon the estate for its value, from the moment that her husband took the legal estate, until he, the alienee, became seised of it again. In a court of equity it is not possible that the demandant could make any thing of such a claim.

With respect to the future allowance to the widow in lieu of dower, which allowance it seems is to be settled by arbitration, we think it should be estimated upon a computation of one-third of the occupation value of the ground, irrespective of the improvements upon it, which have all been made since the alienation of the land by the husband, making an allowance (if it can be done on any satisfactory data) for any probable variation in the value of the land from causes independent of improvements.

We feel how far any direction of this kind must unavoidably fall short of precision, but that is a difficulty which juries and arbitrators have very frequently to encounter.

I will add that in a court of equity the widow of the purchaser of an estate not paid for, and which he had mortgaged back to the vendor to secure the purchase money, could never make good her claim to dower in the estate as if it had been held by her husband unincumbered; and that when the husband had never paid any thing for it, and had conveyed it back to his vendor, I apprehend his widow would be looked upon in no other light than the widow of an intending purchaser, who had not made good his purchase, and had on that account not received a conveyance. What I mean by this is, that it could hardly seem consistent with equity to look upon her claim in any other light, though no doubt it is true that dower is a legal claim in most cases, while in others it may be only a claim in equity, in consequence of the interest being only an equitable one.

Where it is clearly a legal estate, equity I assume must follow the law; but the disposition in this case would be to

look on Asa Norton as never actually holding the legal beneficial interest, by reason of the mortgage which he gave back immediately to secure the price.

I think it was intimated on the argument that this case would probably be carried to the court of appeal. I trust it may be, as it is desirable to have all doubt removed upon the principal point, the right of dower.

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### ROGERS V. VANVALKENBURGH.

*False imprisonment—Justification by peace officer, under charge of felony—Pleading.*

To a declaration for imprisoning the plaintiff, defendant pleaded, that at the time of making the arrest he was a peace officer for the county, and as such was informed that the plaintiff had committed a felony, and was then a fugitive from justice on account thereof; that, as he lawfully might, he arrested the plaintiff, and immediately caused him to be brought before the nearest justice of the peace to answer the said felony, and that the plaintiff was detained in the police station, by said magistrate, which is the trespass complained of.

*Held*, on demurrer, plea good.

DECLARATION.—First count, that the defendant on the 15th of April, 1860, assaulted the plaintiff, and improperly and illegally arrested him, and gave him into custody, and caused him to be imprisoned in a police station in the city of London, in the county of Middlesex, for the space of three days.

Second count, that the defendant assaulted the plaintiff, and beat, bruised, and ill-treated him, and then imprisoned him, and kept and detained him in prison for the space of four days, against the plaintiff's will.

*Pleas*.—1. To the first count, not guilty, by statutes 16 Vic., ch. 180, secs. 1, 16; Consol. Stats. U. C., ch. 126, p. 991.

2. To the said first count, that the defendant is and was at the time the said arrest in the declaration mentioned was alleged to have been committed, a peace officer for the county of Middlesex, and as such was informed that the said plaintiff had committed and been guilty of a felony, and was at such time a fugitive from justice on account thereof; and the defendant, as he lawfully might, took and arrested the

said plaintiff, and immediately caused him to be brought before the then nearest justice of the peace, to answer the said felony he was alleged to have committed; and the defendant further says that the said plaintiff was detained in the police station, as in said count mentioned, by the said justice of the peace to answer the said alleged felony, which trespasses are the trespasses in the said first count mentioned.

The same pleas were pleaded to the second count.

The plaintiff took issue on both pleas, and demurred also to the second plea, on the ground that the plea professes to answer the whole of the first count, and shews no defence but to part of the said count; and the said plea does not shew or allege that the defendant acted *bonâ fide* as a peace officer, or that the defendant believed, or that he had any reasonable or probable cause for believing, the defendant had been guilty of a felony.

*M. C. Cameron*, for the demurrer, cited *Bullen & Leake's* Precedents, 478; *Hogg v. Ward*, 3 H. & N. 417; *Mure v. Kaye*, 4 Taunt. 34.

*Read*, Q. C., contra, cited *Davis v. Russell*, 5 Bing. 345; *Samuel v. Payne*, 1 Doug. 345; *Cowles v. Dunbar*, 2 C. & P. 565; *Rex v. Ford*, Russ. & Ry. 329; *Rex v. Thompson*, 1 Moo. C. C. 80.

ROBINSON, C. J., delivered the judgment of the court.

The law is clear upon the point that a constable may arrest a person without a warrant upon a reasonable charge: that is, upon probable information that he has committed a crime.

As the constable has pleaded the general issue in a manner that enabled him to give the special matter of defence in evidence, it was unnecessary to have pleaded specially besides; and having pleaded his justification specially, the question whether his pleas are good or not can be of no other consequence than as regards the costs of the demurrer.

We think the pleas are sufficient upon general demurrer, and therefore not liable to be excepted to on the ground that they should have gone more into the facts by stating particularly the grounds of suspicion.



It was not necessary, we think, for the constable to state the name of his informant, and in many cases it might be improper to do so, and might lead to injurious consequences. Nor was it necessary for the defendant to allege in the plea that he believed the information to be true, for he was not the judge of the truth of a charge made to him, and might really have no belief upon the subject.

In our opinion the defendant is entitled to judgment.

Judgment for defendant on demurrer.

### THE SAME CASE.

*Defendant not properly appointed constable—Failure to prove justification—Plaintiff guilty of fraud, and defendant's conduct bonâ fide—Verdict for defendant—New trial refused.*

See the pleadings, ante, page 218.

At the trial it appeared that the plaintiff had committed a gross fraud in the city of Detroit, in the United States: that the defendant having received a telegram from a public officer there, arrested him in this province, and took him to the police station in London; and that after three days detention he was discharged, on the ground that the offence was not within the Ashburton Treaty. The defendant had been chief of police in London, and afterwards appointed, from year to year, constable for the county. He had acted for the present year, and there was some evidence of his having been sworn in, but his name was not upon the list of the clerk of the peace of those appointed for that year. The jury were told that defendant having no warrant, and not being a peace officer at the time, the arrest was not strictly legal, and the plaintiff therefore entitled to recover. They found, however, for defendant, and the court refused to disturb the verdict.

The pleadings are set out in the report of the demurrer, ante, page 218.

At the trial of this case, at London, before *Draper*, C. J., it appeared in evidence that the plaintiff had committed a gross fraud in the city of Detroit. He was an auctioneer there, and had received some furniture from a Mrs. Palmer there to sell, but did not pay over to her the proceeds, nor give any account of the sale. He received from her also \$300 in money, which he was to deposit in a bank in her name, and he brought to her a certificate of deposit, which he handed to her. It appeared that he had deposited the money in the bank in his own name, not in hers, and after handing the certificate to her he requested her to let him see

it again, and he snatched it out of her hand, but told her to meet him at the bank at a certain time. She went to the bank, but he did not make his appearance there, and fled to Canada instead.

Mrs. Palmer went to the police office at Detroit, and was advised to take out a warrant, which she did, and came, accompanied by a policeman, to London, in this province, where they found that the plaintiff had been arrested and was in custody. His arrest was made by the defendant, VanValkenburgh, upon a telegraph message sent to the defendant from Windsor, in this province, (opposite Detroit,) to London.

The defendant arrested the plaintiff at the station of the Great Western Railway Company in London, on Saturday night, the 14th of April last, and the defendant with the chief of police took the plaintiff to the police station, and gave him in charge to the constable there, who detained him till Monday, when he was examined before the mayor, and after being sent from thence to the gaol, he was further examined, and at the end of three days was discharged.

Mrs. Palmer, in the information sworn in London, charged the plaintiff with stealing \$250 from her. It appeared to the Mayor that the offence as proved, though it amounted to a gross fraud, was not one of those coming under the Ashburton Treaty for the surrender of fugitive offenders from the United States of America, and he therefore discharged him.

The defendant, VanValkenburgh, was some years ago chief of police in London, but had retired from that situation, and had been appointed from year to year afterwards one of the constables for the county. One of the magistrates for the county proved that he had, as he believed, sworn him into office in the present year: that he had before been appointed from year to year by the quarter sessions, and had been acting as a constable to the time of the trial.

The clerk of the peace swore that he did not find the defendant's name among those appointed in March last, by the quarter sessions: that he was a constable for many years

before, but did not appear to have been appointed in March of the present year.

The mayor swore that the defendant was not a constable of the city, but that he had always understood him to be a constable for the county: that he acted as a detective, and styled himself as such.

The jury were told that it appeared by the evidence that the defendant was not a peace-officer as stated in the plea, for that the presumption that would otherwise have arisen from his acting in that capacity was repelled by proof that he had in fact not been appointed by the quarter sessions in March of this year, when the constables for the county were appointed, and there was no proof of any special appointment: that taking him to be a private person, acting without any warrant, he was not entitled to the same protection that a peace-officer would have been: that the pleas rested his justification upon his being a peace-officer, and that the evidence did not support them.

They were told also, that if the defendant was aware that the only charge against the plaintiff was for felony committed in a foreign country, it was the opinion of the learned judge that he could not legally make the arrest without a warrant: that the telegraph message did not state where the felony was committed, but that it did appear that the person who sent the message was a public officer in Detroit.

The jury were instructed that although the plaintiff's conduct appeared to have been grossly fraudulent, yet his arrest not being strictly legal, he was entitled to a verdict for such damages as they might think proper to give.

The jury found their verdict for defendant.

*M. C. Cameron* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, in leaving it to the jury as a question of fact to find whether the defendant was or was not a constable, when the evidence shewed that he was not upon the list of constables appointed at the general quarter sessions; and also in directing the jury that although the defendant was not informed of any felony committed in the county, but had only received a telegraph from Detroit,



in the United States of America, that the plaintiff had committed a felony, yet if the defendant acted *bonâ fide* he was not liable in this action.

*Read, Q. C.*, shewed cause.

In addition to the cases referred to in the argument of the demurrer, ante, page 219. *Hedges v. Chapman*, 2 Bing. 526; *Hobbs v. Branscomb*, 3 Camp. 420; *White v. Taylor*, 4 Esp. 80; *Consol. Stats. U. C.*, ch. 17, sec. 10, were cited for the defendant; and *Add. on Torts* 401 for the plaintiff.

ROBINSON, C. J., delivered the judgment of the court.

There having been no misdirection in the case, and the plaintiff standing in a very unfavourable light upon the evidence, we will not exercise our discretion by relieving him from the verdict of the jury. The defendant, there can be no doubt, acted from no wrong motive, and the inconvenience which the plaintiff complains of was brought upon himself by his own fraudulent conduct. It is not likely that a jury would give him any thing but the most trifling damages upon a second trial.

We therefore discharge the rule *nisi*.

Rule discharged.

## THE CORPORATION OF THE CITY OF KINGSTON V. SHAW.

*Sale of goods under fi. fa. without paying rent—Action therefor—Averment of notice.*

In a declaration against a sheriff or coroner for removing and selling goods under a writ without satisfying rent in arrear, it is sufficient to allege that defendant had notice of the plaintiff's claim before sale, though after the removal.

It is a bad plea therefore to such a declaration, that defendant had no notice before the removal.

A plea, that after the removal of the goods by defendant there remained sufficient to satisfy the rent in arrear, *Held*, clearly bad.

ACTION upon the statute 8 Anne, ch. 14, against the defendant as one of the coroners of the united counties of Frontenac, Lennox and Addington, for removing goods under a *fi. fa.* without paying rent due to the plaintiffs.

The declaration stated a demise by the plaintiffs to one Mullhall, at a yearly rent of £65, payable quarterly: that

before the seizure six months' rent became due : that under a writ of *fi. fa.* at the suit of one C., the sheriff of said counties, against one H., directed to the defendant, the defendant seized certain goods on the premises, and removed the same therefrom. And the plaintiffs averred that after the said seizure and taking of the said goods and chattels, and the said removal by the said defendant as aforesaid, and before the sale thereof by the said defendant under pretence of and to satisfy said execution, and while the tenancy of the said Thomas Mulhall so still subsisted, the plaintiffs gave notice to the defendant, so being then one of the coroners of the said united counties and charged with the execution of the said writ as aforesaid, of the aforesaid rent so being due and in arrear to the plaintiffs from the said Thomas Mulhall in respect of six months' rent of said premises, and then requested the said defendant that they, the plaintiffs, might be paid their rent so due, in arrear, and unpaid as aforesaid, and for the satisfaction of which said rent the said goods and chattels so seized, taken and removed as aforesaid, were liable as aforesaid : yet the defendant, well knowing the premises, but not regarding the duty of his said office, nor the statute in such case made and provided, but contriving, &c., under colour and pretence of said writ, wrongfully, injuriously and deceitfully removed and carried away the said goods and chattels so seized and taken as aforesaid, from and out of the said messuage and premises, &c., and did not, either before the removal of the said goods and chattels from and out of the said premises as aforesaid, or before the sale thereof as aforesaid, or at any other time, pay or satisfy the said rent so due and owing, and in arrear to them, the plaintiffs, as aforesaid, or any part thereof, contrary to the form of the statute in such case made and provided.

The second count alleged that the plaintiffs issued a warrant of distress for the said rent to their bailiff in that behalf, and therein directed him to distrain for the said arrears of rent, and the said bailiff then duly and according to law distrained for the said arrears of rent, by virtue of the said warrant, certain goods and chattels then being on the said premises, &c. : that afterwards, and whilst the rent was in

arrear, and after such distress as aforesaid, and before any sale thereunder to satisfy the same, the defendant seized and took certain goods and chattels then being on the said premises, which said goods and chattels had been so distrained on for the said rent as aforesaid, and removed the said goods and chattels so taken and seized by him as last aforesaid from and out of the said premises, and sold or otherwise disposed of the same; and the plaintiffs alleged that after the said seizing and taking of the said goods and chattels by the defendant as aforesaid, and after the removal of the same by the said defendant as aforesaid, and before the sale of the same by the defendant as aforesaid, and while the said tenancy of the said Thomas Mulhall in the said premises still subsisted, the plaintiffs gave notice to the defendant, &c., of the said rent so in arrear, and of the distress made therefor by the plaintiffs on the said goods and chattels last mentioned, and forbade the defendant to sell the same until the said arrears of rent had been paid to the plaintiffs, &c., yet the defendant well knowing the premises, but not regarding, &c., wrongfully seized and took the said goods and chattels on the said premises, so being under distress for said rent as aforesaid, and then wrongfully and deceitfully removed and carried away the same from and out of the said premises, without paying the amount of the said distress, or satisfying the plaintiffs the said rent so due them as aforesaid, and unlawfully, under pretence of the said writ, sold the said goods and chattels so being under distress for said rent as aforesaid, notwithstanding the notice of the plaintiffs aforesaid, without first or at any time paying said rent to the plaintiffs, &c.

Defendant pleaded, 2, to the first count, that the plaintiffs did not, after the taking of the said goods and chattels in the said messuage and tenement by the defendant, as in the first count mentioned, or at any time before the removal of the same, give notice thereof to the defendant, nor had the defendant at any time before the removal of the said goods any notice or knowledge whatsoever of the said rent, or any part thereof, or any rent whatsoever being due and in arrear from the said Thomas Mulhall to the plaintiffs.



5. That after the removal of the said goods by the defendant there remained goods and chattels on the said premises sufficient to satisfy the rent in the declaration alleged to be due.

The plaintiffs demurred to both pleas, assigning, as to the second plea, among other causes of demurrer, that no such notice as in the said plea mentioned is necessary before the removal of the goods, the defendant's liability having accrued immediately on their removal, rent then being in arrear in respect of the premises, which he did not pay, and it being the duty of the defendant, before removing the goods, to enquire of the plaintiffs whether any, and what, or how much rent was in arrear.

And as to the fifth plea, that it does not allege whose goods remained on the premises, or whether the goods so alleged to remain were liable to satisfy the said rent, or could be distrained and taken for that purpose: that if the defendant removed any goods from the said premises liable for the satisfaction of the said rent he became accountable to the plaintiffs for the arrears of rent, whether he left goods remaining on the said premises sufficient to satisfy the said arrears, or did not; his liability accruing on the removal of any part of such goods, rent being in arrear, without paying such rent, the plaintiffs being entitled to their full remedy against all the goods on the premises, and not being liable to have that remedy prejudiced, or injured, or reduced, by the removal of any part of such goods before the rent be paid: that the defendant was bound, before removing any part of the goods, to pay the arrears of rent: that removing any part of the goods without doing so made the defendant liable for the rent in arrear, and that if necessary the defendant should have enquired of the plaintiffs and ascertained the amount of rent in arrear.

The defendant joined in demurrer, and gave notice of the following, among other exceptions to the declaration:—

As to the first count, that it is not sufficient to aver that the coroner had notice that rent was in arrear after the removal of the goods from the premises: that it should have been averred that the coroner had notice of the rent being in arrear after the seizure, but before removal and sale.

As to the second count, that it should have contained an averment that the coroner had notice that there was rent in arrear before the removal of the goods from the premises.

The judgment in the county court was in favour of the defendant, on the ground that both counts in the declaration were bad for not averring that notice was given to the coroner, before the removal of the goods, of the landlord's claim for rent. (a)

From this decision the plaintiff appealed.

*Read*, Q. C., for the appellants, cited *Andrews v. Dixon*, 3 B. & Al. 645; *Armitt v. Garnett*, *Ib.* 440; *Riseley v. Ryle*, 11 M. W. 16; *Waring v. Dewberry*, 1 Str. 97; *Lane v. Crockett*, 7 Price 566; *Forster v. Cookson*, 1 Q. B. 419; *Thurgood v. Richardson*, 7 Bing. 428; *Cocker v. Musgrove*, 9 Q. B. 223; *Colyer v. Speer*, 4 Moore 473; *Arch. L. & T.* 247, 250; *Ch. Arch. Prac.* 598; *Saund. Pl. & Ev.* 888.

*A. S. Kirkpatrick*, contra, cited *Arch. T. T.* 250, 251; *Woodf. L. & T.* 406; *Foster v. Hilton*, 1 Dowl. 35; *Smith v. Russell*, 3 Taunt. 400.

ROBINSON, C. J., delivered the judgment of the court.

We gather from the cases cited, and from others, that though the court sometimes gives the landlord the benefit of the statute 8 Anne, ch. 14, by a rule upon the sheriff to pay the landlord his year's rent out of the proceeds of the execution, yet this is merely done by way of giving him a more convenient and less expensive remedy than by action; and we do not think we are at liberty to infer that such a rule would be made except in a case in which an action would lie upon the statute, for if the statute has not been violated, then the execution creditor could not be made to lose any part of the proceeds of the execution. Then we find it in many cases laid down that if the sheriff had notice or knowledge of the claim for rent at any time before he has sold the goods, or before he has paid over the proceeds to the execution creditor, he is bound to retain and pay over the rent to the landlord. We

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(a) The decision in the county court is reported in the *Upper Canada Law Journal*, vol. vi., p. 280.

conclude, therefore, that in any such case an action will lie under the statute, and the case of *Andrews v. Dixon*, (3 B. & Al. 645,) is a case in which an action was brought upon the statute under just such circumstances, and was sustained by the court.

We do not see the form of the declaration in that case, and cannot, therefore, say whether it averred notice before the removal of the goods or not. If it did, it would have been contrary to the fact, and we cannot suppose that the court would have held it to be necessary that the declaration should contain an averment contrary to the truth of the case. We think the cases are to be reconciled by the observation made by Baron *Parke* in *Riseley v. Ryle*, (11 M. & W. 21.) "It is clear," he said, "the statute does not mean the original taking, but that there shall not be a *substantial taking for the satisfaction* of the debt, that is, by the removal *and sale of the goods*, without payment of the rent."

In *Andrews v. Dixon*, the court said, "No specific notice is required by the statute. If indeed a sheriff has no reason to suppose any rent to be due, he will be protected in case he *pays over* the money to the execution creditor." And again, "The notice to the sheriff is only for the purpose of establishing beyond doubt his knowledge of the landlord's claim. If that knowledge can by any other means be brought home to him, *at any time before he has parted with the money*, he will be liable."

We take the court to mean by this that he will be liable to an action under the statute, and not only liable to be ordered on motion to pay the money, for it was in this case in an action under the statute that the court was giving their judgment.

In the case of *Riseley v. Ryle*, which we before cited, Lord *Abinger* remarked that the statute had had a construction put upon it by the cases, and the uniform practice, on which they would be unwilling to throw a doubt. When we look at the statute 8 Anne, ch. 14, we see that by it strictly the sheriff is made liable *if he removes the goods* without paying the rent, without a word said about notice, and then we see that in this declaration this is what is charged



against the sheriff, so that the declaration contains all that the statute requires to make the sheriff liable.

It is true that in addition to this the courts have by their decisions engrafted upon the statute the condition, in favour of the sheriff, that a notice shall be given him, and this notice we take to be an indispensable averment, so that if this declaration had charged the sheriff solely on the ground of his removing the goods, without averring notice of the rent before removal, we think we must have held the declaration to be bad. But in this case the plaintiffs carry their case farther, and complain of the sheriff for going on and selling the goods after he had notice of the plaintiffs' claim for rent, and yet not paying them their claim. And upon such a statement of facts we must, we think, hold that when the statute requires no notice, and when the courts have held the sheriff liable upon a notice given after removal, and before sale, a notice at any time before sale must be sufficient in law, and if sufficient in law, then the stating the facts according to the truth must be sufficient.

In our opinion the judgment should be reversed, for it determines the declaration to be bad; and we think the second plea is not a good bar, though it might have been sufficient if the declaration had not expressly averred notice before the sale of the goods.

The fifth plea is also bad, we think, for several of the reasons assigned.

We think, therefore, judgment must be given for the plaintiffs on the demurrer.

Appeal allowed.

SARAH SPRADBURN WILLIAMS, EXECUTRIX, WM. FRASER,  
JOHN OGILVY, AND JAMES SCOTT, EXECUTORS, OF J. T.  
WILLIAMS, V. CHARLES MARSHALL.

*Promissory note—Action by executors—Acceptance of order on one—Satisfaction.*

A. being sued upon a promissory note by the executors of W., as bearers, pleaded that F., the acting executor, being the holder of the note, accepted an order drawn by one D. on him, in favour of M., for £50, and that M. being the defendant's agent, it was agreed between F. and M. that the note should be paid out of the £50, and F. thereupon cancelled said note.

The evidence shewed that defendant went with the order to F., which F. said he would accept, and pay the note out of it, but there was no acceptance in writing, the note was not given up, and the order was obtained again some months after by M's. executor.

*Held*, that the plaintiffs were entitled to recover, and that a verdict found for defendant must be set aside.

APPEAL from the county court of Northumberland and Durham.

Declaration, on a promissory note for £20, dated the 18th of September, 1854, made by defendant, payable ten months after date, to John Gray, or bearer, and by him transferred to plaintiffs.

*Pleas*.—1. Payment before action. 2. That after the said note became due, and before the commencement of this suit, the plaintiff, William Fraser, being the acting executor of the said will, and then being the holder thereof, accepted an order drawn by one John Donovan upon him, and in favour of William Marshall, for the sum of £50; and the said William Marshall being the defendant's agent, it was agreed between the said William Fraser and the said William Marshall that the said promissory note, in the declaration mentioned, should be paid and satisfied out of the said sum of £50, and he, the said William Fraser, then agreed to and did then cancel and discharge the said promissory note, and he, the defendant, is thereby discharged from the payment thereof.

At the trial the following evidence was given upon the part of the defendant:—

*Simon Marshall*.—Is brother of the defendant: knew John Donovan: there was an order for £50, made by John Donovan in favour of Mr. Marshall, deceased, on Fraser,

one of the plaintiffs. It was for lumber furnished to Fraser: took the order to Fraser for acceptance: Charles, the defendant, went with it: Charles asked Fraser if his brother William had lifted his note: shewed him Donovan's order: Fraser said he would accept the order: Charles asked where the note was: he said they need not mind that, he would fix it. The note was to be paid out of the order, and the balance on a lot purchased of the Williams' estate: he said they might go home, he would make it all right: the order was not accepted in writing.

*Thomas Little.*—Went to Fraser about the note: took Donovan's order to Fraser: Fraser said it was all right: he said he had promised to pay the note: that he would do so, and he would pay the balance in three or four weeks. The note was settled: the order was left with Fraser's clerk, as Fraser had directed him: he said he would pay the balance.

*George Brogdin.*—Saw the order: it was in witness' possession: it was brought to witness by one of Marshall's executors: we cannot find it: it was brought to witness to collect.

*John Carveth.*—Went to Fraser about the payment of the order twice: the second time demanded payment of the balance of the order: understood it was to be turned on the lot: got the order from Fraser's office, who had it for six or eight months.

The learned judge charged the jury that if they found that the order was left with Fraser and received by him in payment of the note, and that he was acting for the estate, then their verdict should be for defendant, unless they found that the subsequent return of the order to Carveth was intended by both parties as cancelling the former arrangement.

*Scott*, for the plaintiffs, contended that he should charge the jury in direct terms that there was not proof of payment.

The jury found for defendant, and a rule *nisi* obtained for a new trial was afterwards discharged, whereupon the plaintiffs appealed.

*Richards*, Q. C., for the appellant, cited *Collinson v. Lis-*



ter, 7 De G. McN. & G. 334; *Liversidge v. Broadbent*, 4 H. & N. 603.

*Bethune*, contra, cited Wms. on Exrs. 840; *McLeod v. Drummond*, 17 Ves. 154; *Farr v. Newman*, 4 T. R. 625, note 642, 645; *Kelsock v. Nicholson*, Cro. Eliz. 478, 496; *Belshaw v. Bush*, 11 C. B. 191; *Hough v. May*, 4 A. & E. 954.

ROBINSON, C. J., delivered the judgment of the court.

We think a new trial ought to have been granted in this case, and that judgment should be reversed, and the rule for a new trial made absolute without costs.

If the defendant had transferred or given up to Fraser an order of Donovan, in favour of the defendant, upon Fraser, for an amount due by Fraser to Donovan, though on his private account, and if Fraser had, in consideration of such transfer of the order, given up to the defendant the note now sued upon, then the case cited from Cro. Eliz. 496, *Kelsock v. Nicholson*, might have applied; though whether in that case the note would have been thereby satisfied, or cancelled, so that the executors could not sue upon it, or demand it back, it is not necessary to decide.

But here the order of Donovan was in favour of William Marshall, not of the defendant, Charles Marshall, who made the note, and there is no proof of a binding acceptance by Fraser, nor any right of action vested in the executors against any one upon it; and besides all this, the order itself has been demanded back by William Marshall or his executor, and has been given up by Fraser. All that was proved in fact is that Fraser, when the order was left with him, said that he would settle the debt, which he never did, nor ever gave up the note sued upon, nor discharged the defendant from it.

Appeal allowed.

IN THE MATTER OF THE COMMERCIAL BANK OF CANADA,  
AND THE LONDON GAS COMPANY.

*Gas Company—Obligation to supply gas—Mandamus—Consol. Stats. C., ch. 65, sec. 65.*

A gas company, incorporated under the Consol. Stats. C., ch. 65, having made a charge for a special illumination, which was disputed as excessive, refused to supply gas to the same premises for ordinary purposes until their claim had been paid.

*Held*, that they were not justified in taking this course, but that a *mandamus* would not lie, as the statute imposed no duty; and that the only remedy was by action.

*J. Wilson, Q. C.*, moved for a *mandamus nisi* to compel the London Gas Company to supply the Commercial Bank of Canada with gas, for their banking house and premises in the City of London.

The bank had employed the London Gas Company to illuminate their building on the nights of the 12th and 13th of September, on the occasion of the visit of His Royal Highness the Prince of Wales to that city; and on the 24th of October following, the gas company rendered their account to the bank for this service, charging as follows: "To gas supplied for illumination on the 12th and 13th of September, 1860, use of meters, pipes, cocks, elbows, &c., also expence laying and taking up service pipes, &c., \$75."

The bank agent thought the charge excessive and resisted it. The building which had been illuminated was a new bank, lately erected in the city of London, which had not yet been lighted with gas for ordinary purposes, and on the 2nd of November, 1860, the building being then ready to receive gas lights, the manager of the bank wrote to the manager of the gas company to say that the bank wished gas to be put into their new building without delay, in order to test the pipes, and to enable the plumber to finish his work according to his contract, stating also that there would be thirty or possibly thirty-five lights required.

The manager of the gas company replied in writing, "that it was an imperative rule of the company not to supply gas to any premises unless all arrears due on the same be first paid, and that the gas company declined complying with his request till their claim be first paid off,"

alluding, no doubt, to the bill which had been rendered for the special service of illuminating on the 12th and 13th of September.

The bank manager made affidavit that the building was one which had been lately erected at a cost of more than \$30,000, and that the bank had caused it to be furnished with the necessary pipes and gas fittings: that he had not paid the bill because he was informed that it was greatly excessive, and believed it to be so: that he had always been willing to submit to a legal decision, and to pay into court in the meantime a sum sufficient to cover the amount, and any expenses that might be incurred in obtaining a decision, but that the agent of the gas company had declined to sue on the account, and desired to compel the bank to submit to his charge by holding it as a lien upon the property, and refusing to supply gas for ordinary consumption till it was paid.

An affidavit was made also by the solicitor of the bank, to the effect that the gas company was in full operation: that the public streets and public and private buildings in the immediate neighbourhood of the bank were all lighted with gas: that he offered to the agent for the gas company to pay into court \$75 or \$100, pending a legal decision on the charge made, and to pay in advance any sum that might be considered sufficient for supplying the bank with gas for a quarter, and to pay also the expense of laying a pipe from the main pipe in the street to the bank building, all of which offers the agent declined, and he refused to supply the gas as requested.

ROBINSON, C. J., delivered the judgment of the court.

We are not satisfied that the charge in question is excessive, or so much so as to make it worth while for the bank to resist it, but that is a matter for their consideration, and on which it does not rest with this court to determine. Whether it is excessive or not, we think the gas company is not right in assuming that they are justified by the 65th section of the Gas Companies' Act., (Consol. Stats. C., ch. 65,) in withholding the supply of gas till this account is settled.



That clause applies only, as its language shews, to cases where a customer of the gas company has neglected or refused to pay arrears due for gas supplied in the ordinary course, at the regular and known rate of charge.

This is a charge made for a special service, which it must be open to the bank to dispute without being exposed to be deprived of light till they have submitted to any charge which the gas company might choose to make. It cannot be contended that if the gas company or their agent had chosen to charge \$750, instead of \$75, the bank had no alternative but to submit to it, or to have the supply of gas for ordinary purposes stopped or withheld.

Our opinion therefore is that the gas company are not pursuing a reasonable course, or one in which the law can uphold them.

But still there is the question, whether this is a proper case for a mandamus, and we think it is not, for the statute does not in terms make it imperative on the gas company to supply gas to any one that desires it. They stand in that respect on the same ground as a railway company would that should refuse to carry goods for a particular party, or to carry a particular passenger. In both cases the party whom the company refuses to serve may have a clear right to sue for damages; but that would be, not for refusing to do any thing that the statute directly prescribes, for the statute may be silent on the subject, but for wrongfully refusing to discharge a duty incumbent upon them upon common law principles. In such cases a mandamus is not the proper course, but the party complaining must seek his remedy at common law by action.

If the duty should be held to be clearly incumbent upon the company, a jury will have ample power to do justice to the party complaining, and will hardly fail to do so. If the duty be not clear, then there could be no pretence for a mandamus

Rule refused. (a)

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(a) See *The Hoddesdon Gas Company, (Limited,) Appellants, and Haselwood, Respondent*, 6 C. B. N. S. 239.

## EVANS ET AL. V. MORLEY.

*Promissory note—Lottery—Pleading.*

*Declaration* on a promissory note for £15, payable to G., or bearer.

*Pleas.*—1. That before the making of said note, G. did corruptly and against the statute hold a lottery of land, and did sell and dispose of the tickets for £15 each, and that defendant purchased one, for which this note was given. 2. Alleging the same facts, and adding, that the plaintiffs when they took the note had notice and knowledge of the premises, and became the bearers of it after it fell due, without consideration, and always held and now hold the same without consideration. 3. That the note was given for a certain parcel of land, which was won by unlawfully gaming and playing, contrary to the statute. 4. That defendant was induced to make the note by the fraud of said G. and others, and that the plaintiffs took it after it became due, without consideration, and with full knowledge of the premises.

*Held*, on demurrer, first and third pleas bad, second and fourth pleas good.

This was an action removed by *certiorari* from the first Division Court of Frontenac, Lennox, and Addington.

*Declaration.*—That the defendant on the 2nd of July, 1856, by his promissory note, now overdue, promised to pay Henry G. Gillespie, or bearer, the sum of £15, twelve months after date, and the plaintiffs became the bearer thereof, but the defendant did not pay the same.

*Pleas.*—1. That before the making of the said note the said Henry G. Gillespie did, corruptly, and against the form of the statute in that behalf, set up and hold in the town of Belleville a lottery of land situate in the county of Hastings, and did sell and dispose of the tickets of the said lottery at £15 each: that he, the defendant, bought and purchased one of the said tickets, for which ticket the said note was made and given.

2. That before the making of the said note the said Henry G. Gillespie did set up and hold in the town of Belleville a lottery of land situate in the county of Hastings, and did sell and dispose of the tickets of the said lottery at £15 each: that he, the defendant, bought and procured of the said Henry G. Gillespie one of the said tickets, for which ticket the note declared on was made and given by the defendant to the said Henry G. Gillespie: that the plaintiffs when they became the bearers of the said note had notice and knowledge of the premises, and became the bearers of the said note after it fell due, and without any

value or consideration therefor, and always held and now hold the said note without value or consideration.

3. That the said promissory note was made and given by the defendant for the consideration of a certain parcel of land of great value, situate in the township of Elzivir, and which said parcel of land was won by unlawfully gaming and playing, against the form of the statute in that behalf.

4. That he, the defendant, was induced to make the said note by the fraud, covin, and misrepresentation of the said Henry G. Gillespie and others, and that the plaintiff held and took the same after it became due, and without value or consideration, and with full knowledge of the premises.

*Demurrer.*—That none of the said pleas shew the said note to be void, and if not void the plaintiffs ought to recover, notwithstanding the averments in the said several pleas.

That as to the first plea, it is consistent with the allegations therein that the plaintiffs received the said note *bonâ fide*, for value, before it became due, and without notice.

That as to the second plea, it is consistent with the allegations therein that the plaintiffs received the said note from some person, other than the said Henry G. Gillespie, and that such person had become the *bonâ fide* holder thereof for value, and without notice.

That the third plea states a good consideration received by the defendant for the said note, namely, a parcel of land, and does not allege that the giving of the note therefor was in any way connected with the alleged unlawful gaming; and it is consistent with the truth of the said plea, that the unlawful gaming had taken place after the said note was given, and that the land had been won from the defendant by such unlawful gaming, not by him; or that such unlawful gaming had taken place between other parties, with whom the defendant might have no privity.

That the fourth plea is bad on the same grounds as above alleged as to the second plea.

*Campbell, Q. C.*, for the demurrer, cited Wallbridge v. Becket et al., 13 U. C. R. 306; Arbouin v. Anderson, 1



Q. B. 498; *Bartlett v. Benson*, 14 M. & W. 733; *Noel v. Rich*, 2 Cr. M. & R. 360; *Adams v. Jones*, 12 A. & E. 455.

*Richards*, Q. C., contra, cited *Bank of Montreal v. Cameron*, 17 U. C. R. 638.

ROBINSON, C. J., delivered the judgment of the court.

The first plea is bad, we think, because it assumes that the note being given for the price of a lottery ticket would be bad even in the hands of a *bonâ fide* holder of the note, for value, and having no notice when he took it of the alleged consideration for which it had been made. This would clearly not be the case under the lottery act which must govern here, (the English statute,) for it does not make void the *securities* given on account of such transactions, and therefore did not affect innocent holders of negotiable notes, neither indeed does our own statute, 19 Vic., ch. 49, which, however, was not in force when this note was made.

The second plea in our opinion is sufficient.

The third plea we think is insufficient, for it does not state that there was any unlawful gaming out of which this note grew, but only that the land for which it was given was "won by gaming," which alleged fact has no apparent connexion with the giving of this note. If the defendant had won the land at play, he would not have had occasion to give his note for it.

For all that appears the defendant means nothing more than that Gillespie, who sold the land to the defendant, had won it by gambling from somebody else, which could not affect the plaintiffs' right to recover on the note.

The fourth plea we have no doubt is sufficient.

In the argument of this case the defendant's counsel rested upon the case of the *Montreal Bank v. Cameron*, decided in this court, as determining the sufficiency of the second and fourth pleas in this case. There is, however, this difference between the two, that the plaintiffs had in that case set forth in the declaration how they acquired the bill they were suing upon—namely, by endorsement by one Dales—but this declaration does not disclose the plaintiffs' title otherwise than in general terms, as being the bearers.

For all that is stated the note may have come to the plaintiffs after it had passed through many hands, for value ; but still we think these pleas sufficient, for they aver that the plaintiffs took the note after it became due, with knowledge of the illegality, and giving no value for it.

We refer to *Bartlett v. Benson*, (14 M. & W. 737,) as supporting the judgment given in *Montreal Bank v. Cameron*.

Judgment for plaintiffs on demurrer to 1st and 3rd pleas, and for defendant on demurrer to 2nd and 4th pleas.

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### STEBBINS V. ANDERSON.

#### *Commission to take evidence—Affidavit of execution.*

A commission to take evidence issued to one G., of the city of Hartford, in the United States, to take the evidence of one S. of the said city. It was returned with an affidavit of the commissioner of due execution, sworn at Hartford before the mayor of that city, but there was nothing in the affidavit to shew that the witness was examined there.

*Held*, sufficient.

*Quære*, whether it is essential that the affidavit shall be sworn before the mayor, &c., of the place where the evidence is taken.

ACTION on a bond executed by the defendant, with a condition that one Anderson should conduct himself faithfully as agent of the plaintiff for selling books, pay over all moneys, &c.

Plea, performance of condition.

At the trial, at Toronto, before *Richards, J.*, the plaintiff, to prove his case, relied on evidence taken in the United States of America, under a commission.

An objection was taken by the defendant to the admission of the evidence, on the ground that the affidavit of due taking of the testimony under the commission was insufficient.

The ground of exception was that the affidavit did not appear to have been sworn before a person competent to administer the oath for that purpose.

The evidence was taken subject to the objection, and the plaintiff recovered a verdict for £150.

The commission to take evidence issued from this court, directed to George Shepard Gilman, of the city of Hartford,

in the state of Connecticut, in the United States of America, authorising him to examine one Simeon S. Scranton, of the said city of Hartford, a witness in this cause, on behalf of the plaintiff, at a certain day and place, or certain days and places, to be appointed by him.

The commission contained a direction to the commissioner, that before he entered upon the examination of the witness he should take an oath, of which the form was endorsed, before the mayor of the said city of Hartford, faithfully and without partiality to take the examination and deposition of the witness.

It was not stated in the paper containing the answers to the interrogatories at what place the witness was examined.

The commissoner certified that before proceeding with the examination of the witness he took the oath prescribed in the commission, and that the sheet on which this certificate was written contained a true statement of the evidence of the witness, Scranton.

There was also returned, with the commission, an affidavit of the commissioner that he had duly and faithfully executed the annexed commission, and that the return thereto contained a true statement of the evidence, as taken by him under and in pursuance of the said commission. There was nothing on the face of this affidavit to indicate where it was sworn, or where the examination of the witness was taken, nor was there any day mentioned on which the examination was stated to have taken place.

Under the affidavit of the commissioner was written :

State of Connecticut, City of Hartford,  
Mayor's office, October 16, 1860.

Personally appeared George Shepard Gilman, subscriber to the above affidavit, and made oath to the truth of the same by him subscribed ; and I also certify that I administered to him the oath prescribed in number two, annexed to this commission, before me.

HENRY C. DEMING,  
Mayor of the city of Hartford.

*McMichael* moved for a new trial for the improper reception of evidence.



*R. A. Harrison* shewed cause, and cited *Hibbert v. Johnston*, 6 O. S. 635; *Farrel v. Stephens*, 17 U. C. R. 250; *McLeod v. Torrance*, 3 U. C. R. 146; *Atkins v. Palmer*, 4 B. & Al. 377; *Simms v. Henderson*, 11 Q. B. 1015, 1025; *Doe Lemoine v. Raymond*, 5 O. S. 337; *Doe Park v. Henderson*, 7 U. C. R. 188; *Broom Leg. Max.* 729; *Consol. Stats. U. C. ch. 32*, secs. 19, 20, 21.

ROBINSON, C. J., delivered the judgment of the court.

In the Consolidated Statutes of Upper Canada, ch. 32, sec. 21, it is provided that "In case the examination of any witness or witnesses taken without the limits of Upper Canada, pursuant to any such commission, be proved by an affidavit of the due taking of such examination *sworn before and certified by the mayor or chief magistrate of the city or place where the same has been taken*, and in case such commission, with such examination and affidavit thereto annexed, be returned to the court from which such commission issued, close under the hand and seal of one or more of the commissioners, the same shall *primâ facie* be deemed to have been duly taken, executed and returned, and shall be received as evidence in the cause, unless it is made to appear to the court in which such examination is returned and published, or before which the same is offered in evidence, that the same was not duly taken."

It is not objected that the commission and evidence were not duly taken and returned, in any other respect than that it does not appear on the face of the proceedings that the witness was examined *in the city of Hartford*, and so it did not appear to the court that the affidavit of due taking "was sworn before and certified by the mayor or chief magistrate of the city or place where the examination was taken."

We think that the objection taken to the commission was not fatal, for that we may properly apply the principle "*omnia præsumuntur rite esse acta*" to this extent, that we may assume that where the commissioner and the witness both lived in the city of Hartford, the commissioner observed the direction of the statute in going before the chief magistrate of that city, to make the affidavit of due taking,

rather than that we should entertain the surmise that the commissioner went away from the place in which he and the witness lived, in order to have the examination taken elsewhere, in which case the mayor of Hartford might not be the proper person to swear the commissioner to the affidavit.

The late case, *In re Saunderson*, (29 L. J. C. P. 264,) goes far to support the plaintiff's case against the objection taken.

And it is material to observe that the provision in the statute as to the affidavit of due taking being sworn before the chief magistrate of the place where the evidence shall be taken, is hardly to be looked upon as a *direction* in the statute, but rather as a permission, for the sake of convenience, to go before the chief magistrate of the town in which the duty has been performed, though it may be an obscure and inconsiderable borough, and not to make it necessary to go a distance in order to get the certificate of some more prominent public officer.

Rule discharged.

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### CROSS V. GOODMAN.

*Seduction—Action by the mother—Abatement by death—Consol. Stats. U. C., ch. 77, sec. 3.*

Where the mother of the person seduced brought an action within six months from the birth of the child, *held*, that by the statute the master's right of action was taken away, notwithstanding that the suit brought by the mother had abated, owing to her death after verdict in her favour had been set aside, and before a new trial granted had taken place.

DECLARATION for seduction of C., the plaintiff's servant, alleging the birth of a child, and expenses and loss of service caused to the plaintiff.

*Plea*, that at the time of the birth of the said child one H. C., the mother of the said C., was resident in Upper Canada, and did within six months from the birth of the said child commence an action against the now defendant for the seduction of the said C.; and the defendant further says that the seduction of the said C., in the said last mentioned action complained of by the said H. C., and the trespass and seduction in the present action by the plaintiff herein com-

plained of, are one and the same, and not different trespasses and seductions.

*Replication*, that after the commencement of the action by the mother of the said H. C., in the said third plea mentioned, and after a verdict therein obtained by her against the said defendant, at the spring assizes for the county of Lincoln, in the year 1859, the said defendant, in Easter Term next thereafter, and before judgment, applied to the Court of Common Pleas in which the said action was pending to set aside the said verdict, and for a new trial, and obtained a rule *nisi* therefor, on grounds disclosed in certain affidavits then filed in said court: that the said rule *nisi* was enlarged till Trinity Term then next following: that the said rule was in said Trinity Term, after argument by counsel, made absolute, and the said verdict for the said H. C. was set aside by the said Court of Common Pleas, on payment of costs: that the said costs were afterwards taxed and paid by the said defendant: that after the said verdict was set aside and costs paid, and before the assizes for said county of Lincoln next following the said Trinity Term, and before any second trial of the said action was or could be had, to wit, on the 4th of October, 1859, the said H. C. died, whereby the said action abated; and the said C. having been at the time of the said seduction the servant of the now plaintiff, as in the declaration alleged, the said plaintiff would have been entitled at common law, and is now entitled, to maintain this action; and that this action was commenced after the death of the said Harriet Chisholm, and after the said action brought by her had abated as aforesaid, and after the expiration of six months from the birth of the child.

*Demurrer*, that it is admitted by the said plea that the plaintiff is a person who but for the statute might have maintained this action, and the fact that the action commenced by the mother of the said C. has abated, as stated in the replication, does not take the case out of the operation of the statute Consol. Stats. U. C., ch. 77.

*Anderson*, for the demurrer.

*R. A. Harrison*, contra, cited Com. Dig. "Abatement"



M.; Smith on Actions, 3rd Ed. 187; Sellon's Prac., vol. ii., p. 401; Dwarris on Stats, 613; Whitfield v. Todd, 1 U. C. R. 223; L'Esperance v. Duchene, 8 U. C. R. 149.

ROBINSON, C. J., delivered the judgment of the court.

The question brought up by this demurrer is whether the circumstance of the father or mother of a girl who has been seduced having brought an action within six months, (the period reserved to them by the statute,) disables the person with whom the girl was living as a servant at the time of her seduction from bringing an action, as he might have done at common law, or as he might have done under the statute, if neither the father nor mother had ever sued; the fact being, as in this case, that the mother being resident in Upper Canada, who had brought an action within six months, died before verdict, or, which we take to be the same thing, died after a verdict had been given in her favour, which was afterwards set aside and a new trial granted, which never took place in consequence of her death.

It is assumed by the plaintiff in his answer to defendant's plea, that the action of the mother abated, and could not be revived at the instance and in the name of her executor or administrator.

The provision in the third clause of the statute, ch. 77, Consol. Stats. U. C., is this: "Any person, other than the father or mother, who by reason of the relation of master, or otherwise, would have been entitled at common law to maintain an action for the seduction of an unmarried female, may still maintain such action, if the father or mother be not resident in Upper Canada at the time of the birth of the child, which may be born in consequence of such seduction, *or being resident therein does not bring an action for the seduction within six months from the birth of such child.*"

In the case before us, the mother of the girl seduced being resident in Upper Canada, sued the defendant for the injury accruing to her by the seduction, bringing her action within six months. Taking the statute literally, that disabled any person from bringing an action afterwards as the master of the young woman; and we think it is no sufficient answer to

reply that the action brought by the mother abated by her death, after there had been a trial and a verdict rendered in her favour, which upon the application of the defendant was set aside on payment of costs.

Not only the very words of the statute, but the reason of the thing also, in our opinion, prevent our holding that the plea is well answered by such replication. The defendant should not be twice harrassed for the same cause of action ; that is, we mean by two persons having no privity with each other. If neither parent had sued within six months, then the plaintiff might have sued, but the mother having sued, we think the right of action thereby vested in her, and the defendant being put to the expense of defending himself in that suit so far as it went, cannot in our opinion be attacked in an action by another party for the same injury, and an action brought and attempted to be sustained contrary to the language of the act.

We think the defendant is entitled to judgment, for the replication is not a good answer to the plea.

Judgment for defendant on demurrer.

### THE QUEEN V. ARMSTRONG.

*Indictment—Breach of trust—Consol. Stats. C., ch. 92, sec. 44—Meaning of the word “agents” in that clause.*

The indictment charged that one M. entrusted to defendant, then being an agent, a promissory note of one R., for \$200, for the special purposes of receiving £6 thereon from A., and that defendant, contrary to the purpose for which said note was entrusted to him, did unlawfully negotiate and convert the same to his own use.

It appeared that R. had made the note for A's. accommodation, and A. being indebted to one C. in £6, it was agreed that he should deposit this note with M. to secure the payment. Defendant, by C's. order, got the note from M. on condition that he should give it up to A. on the £6 being paid. A. afterwards paid this sum to defendant, but defendant kept the note and sued R. upon it, alleging that he was entitled to do so by some arrangement with R., which the jury found was not the case, and they convicted defendant.

*Held*, that the conviction could not be sustained, for defendant was not an agent within the meaning of the act, which refers only to general agents of the descriptions specified ; and *semble*, that upon the evidence he was not M's. agent, or guilty of any breach of trust towards him.

The indictment alleged that on the 10th of January, 1858, at, &c., James Macdonald did entrust to Robert Armstrong,

for the special purpose of receiving the sum of six pounds thereon from one Robert Arthurs, the said Robert Armstrong then being an agent, a promissory note of one Christopher Rowe, for the payment of two hundred dollars, without any authority to him, the said Robert Armstrong, to sell, negotiate, transfer or pledge the said promissory note; and that the said Robert Armstrong, agent as aforesaid, on the said first day of April, 1860, in violation of good faith, and contrary to the object and purpose for which such promissory note was entrusted to him as aforesaid, unlawfully did negotiate and convert to his own use and benefit the said promissory note.

At the trial, at Toronto, before *Richards, J.*, the facts appearing applicable to the points raised were as follows:—One Christopher Rowe, at the request of one Robert Arthurs, on the 5th of January, 1858, made a promissory note for £50, for Arthurs' accommodation. Arthurs was indebted to one Cool, a bailiff at Brampton, in about six pounds currency, for his fees and expenses on an execution in his hands against Arthurs, on which he had seized Arthurs' cattle. Cool offered to give up the cattle to Arthurs, and to give him two weeks time to pay the six pounds, if he would leave Rowe's note for fifty pounds above referred to in the hands of one James Macdonald, at Brampton, as security. The note was left with Macdonald on the terms that if Cool's costs were not paid by the time agreed upon he was to give up the note to Cool, who was to return it to Arthurs when his costs were paid. The defendant, Armstrong, also had several executions against Arthurs' property, and Cool desired him to get the note for £50 above referred to from Macdonald, and when his costs of six pounds were paid to give up the note. Macdonald refused to give the note up to defendant until Cool gave him directions so to do. Cool then directed him to give the note to defendant, on the terms that he was to give it up to Arthurs on Cool's costs being paid to the defendant. The note was then given to defendant on these terms. This was about the middle of January, 1858. On the 18th of January of the same year Arthurs paid defendant the whole



of Cool's costs, and on the 15th of January the defendant had agreed to give the note (£50) to Rowe on Cool's costs being paid. Defendant was repeatedly applied to by Rowe for the note, but did not give it up, though Arthurs had given an order on him to deliver it to Cool. In the latter part of March, or the beginning of April last, he handed the note to one John Tilt, saying he had a lien on it, and could not bring Rowe to a settlement. Tilt told defendant to give him the note, and he could bring him to a settlement. Tilt put the note into the hands of an attorney, and directed him to write to Rowe, which was done. The note was afterwards sued in Tilt's name. Tilt stated that defendant informed him he had at first got the note from Macdonald: that he had given it up to Rowe, and that Rowe had altered the date, and given it back to defendant to hold for other claims which he, defendant, had against Rowe: that Armstrong stated that he had claims against Rowe for costs paid Mr. Patterson in Toronto, £11 odd, and other claims in respect to the price of a horse. The note was not transferred to Tilt for any value. Armstrong did not pretend that the whole amount of the note was due to him. The matters between Rowe and Armstrong were left to arbitration, and a small amount found in Armstrong's favour. Mr. Tilt offered to the arbitrators to give up the note to Rowe.

Amongst other objections taken by the prisoner's counsel was the following: that he was charged with applying the note in question to a different purpose from that for which it was entrusted to him by Cool and Macdonald: that as far as they had any interest in the matter, the misapplying of it did not prejudice them; and that the prisoner was not an agent within the meaning of the statute at the time he transferred it to Tilt.

The learned judge overruled the objection at the time, but reserved the question for the consideration of this court, under Consol. Stats. U. C., ch. 112, and postponed the judgment on the conviction aforesaid until such question should be considered and decided; the prisoner having entered into a recognisance of bail, with two sufficient sureties, himself in £200 and his sureties in £100 each,

conditioned for his appearance at the next assizes for the United Counties of York and Peel to receive the judgment of the court.

The jury were told that if Rowe ever gave the note to defendant to keep as collateral security they should find for defendant, but they were not satisfied of this, and found him guilty.

The question for the consideration of the court was whether the defendant could be considered an agent within the meaning of Consol. Stats., ch. 92, sec. 44, who had transferred a valuable security in violation of good faith, he having transferred the note referred to to Tilt after the claim of Cool was paid, the note having been deposited for the purpose of securing such claim, and the delivering of it over to Rowe being for his benefit, and not for the benefit of the person from whom he, defendant, received it, and for whom he might be considered an agent.

*R. A. Harrison*, for the Crown, cited *Hatfield v. Phillips*, 9 M. & W. 647; *DeBlaquiere v. Becker*, 8 C. P. 167; *Russell on Crimes*, vol. ii., p. 192-4.

*M. C. Cameron*, contra, cited *Rex v. Prince*, 2 C. & P. 517; *Sandiman v. Breach*, 7 B. & C. 100; *Rex v. Walsh*, Russ. & Ry. 215; *Rex v. White*, 4 C. & P. 46.

ROBINSON, C. J., delivered the judgment of the court.

We do not think that this conviction can be supported, for the defendant is not shewn by the evidence to have been an agent within the meaning of the statute, which was meant to insure as much as possible the integrity of factors, bankers, attorneys and other agents, who, in transacting business for others in some general line of agency, have necessarily a confidence reposed in them which gives them frequent opportunities of committing frauds, by abusing the trust which the necessities of business render it indispensable should be placed in such agents.

The defendant was not an agent of that kind. This was a transaction unconnected with the carrying on a business which would lead to the defendant being intrusted as a mer-

cantile, professional, or other agent of any general description. It would be carrying the statute to an extent which we are persuaded was not contemplated; in fact it would be difficult to say who might not be reckoned an agent within the meaning of this statute, if the defendant could be held to come within it.

The case of Prince, (2 C. & P. 517,) is much in point. It is true that in consequence of this provision being embodied in a statute of a very general character, containing more than eighty clauses, the statute has no particular recital that can assist in explaining its meaning and thus limiting its operation, as was the case in regard to the statute on which Prince was indicted; but, on the other hand, the English statute had the words, "*of any description whatsoever*" after the words "agents," which certainly made it more difficult to apply to that statute than to ours the principle of the decision in Sandiman v. Breach, (7 B. & C. 100,) cited by Mr. Cameron, namely, that "where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*," and therefore that agents of any description whatsoever could only mean *general agents*. We think this case should be governed by that maxim.

It is material also to remark that the 44th clause of ch. 92, Consol. Stats. of Canada, was taken from sec. 41 of the 4 & 5 Vic., ch. 25, which clause is introduced in that act by the preamble, "and for the punishment of *embezzlements* committed by agents entrusted with property;" and though in the Consolidated Statutes it has become dissociated from that preamble, we do not suppose that the legislature had any other object in view, when they transferred the clause to ch. 92, then they had in the passing the statute 4 & 5 Vic., ch. 25, in which it first appeared.

Taking this view of the statute, it is not necessary to determine whether the charge in the indictment was in other respects proved, though we must say that we have no idea that the evidence could be held to have supported the indictment. We do not see how it could be held that there was between Macdonald and this defendant any thing like that relation of



principal and agent which must clearly form the very foundation of such a charge as this. Macdonald too had no interest in the note himself, and never employed this defendant to do any thing with the note on his, Macdonald's, account. He had only been the holder of the note for Cool's benefit, and when he gave up the note to Arthurs with Cool's consent, he had done with the note altogether, except that he was exposed to the chance of being made liable in a civil action himself, if he had acted unfaithfully as trustee or deposittee in putting the note out of his hands. But it seems he only did what that person agreed he might do who had left the note with him; that is, he handed over the note to this defendant, Armstrong, upon receiving from him the promise which Cool exacted, that he, the defendant, would give the note back to Arthurs, from whom Cool got it, in order to obtain from Rowe the £6 due from Arthurs to Cool.

His placing the note in Tilt's hands, if he had even transferred it to him, (which he did not,) or if the purpose for which he did place it in his hands could be held to be a conversion within the meaning of the act, was no breach of a trust reposed in the defendant by Macdonald, and was no fraud upon Macdonald, who was no longer concerned in the matter. If any one was injured by what Cool did, it would seem to be Arthurs, but certainly not Macdonald. But we doubt whether the court were able to get out the real truth of the case at the trial.

We think that the defendant ought not to have been convicted.

Conviction set aside.

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## CARTWRIGHT ET AL. V. MCPHERSON.

*Landlord and tenant—Expiration of term—Agreement for new lease—Position of tenant before lease executed—Offer to lease—Ejectment—Denial of plaintiffs' title—Notice to quit—Estoppel.*

Defendant had been tenant to the plaintiffs at a yearly rent, payable quarterly, for a term which expired on the 1st of June, 1859. About that time a new lease was agreed upon between them at an advanced rent, but none was executed owing to objections raised by defendant to the draft. Defendant paid a year's rent, and another quarter having fallen due the plaintiffs distrained, but they afterwards abandoned that proceeding, and on the 17th of September, 1860, the plaintiffs' attorney served a written demand of possession on defendant, who told him that was just what he wished, and that the plaintiffs might have the place. He refused, however, to go at once with the attorney and give it up, saying that he wished first to remove some things. Nothing more was done, and the plaintiffs three weeks after having brought ejectment, defendant besides denying their title claimed to hold as their tenant.

*Held*, that the plaintiffs were entitled to recover, for 1, the defendant having denied their title could not insist upon notice to quit, and 2, he was estopped by his offer to leave the place.

*Seemle*, that defendant, though he had not accepted the lease tendered, was under the circumstances the plaintiffs' tenant.

*Burns, J.*, dissenting, on the ground that defendant being in as a yearly tenant, what took place on the 17th of September did not alter his position, and that his notice was only a denial of the plaintiffs' right to possession, not of his title.

EJECTMENT by landlord against the tenant, for premises in the village of Napanee. The defendant in his notice, besides denying the plaintiffs' title, claimed as the plaintiffs' tenant.

The case was tried at the last assizes held at Kingston, before *Burns, J.*, when it appeared that the defendant had been tenant to the plaintiffs for a term of years, which expired on the 1st of June, 1859, at an annual rent, payable quarterly. About the time of the expiration of the old lease the parties treated with each other for a new lease of a portion of the premises at an annual rent of £125 a year, payable quarterly, as the former rent had been, and a lease was to be prepared for a term of ten years. Things remained in that state, without any written lease having been prepared, until July, 1860, when the plaintiffs distrained for a year's rent at £125. The defendant then applied for the written lease, and thereupon got a stay of proceedings on the distress warrant. The plaintiffs' solicitor then prepared a draft of a lease and left it with defendant. He kept it for three or four weeks, and objected to sign it on account of some of

the provisions. A new draft lease was prepared not open to the objections made, and left with defendant, when he again made other and new objections, one or two of which the plaintiffs were not willing to give way to, though as to others they were willing. In the meantime the defendant paid the year's rent. Subsequently a quarter's rent became due, and a distress was made for that quarter. After that was done the plaintiffs abandoned further proceeding with the distress, and on the 17th of September served the defendant, through their attorney, with a written demand of possession of the premises. When that was served the defendant said to the plaintiffs' attorney that it was just what he wished should be done, and that the attorney might go and take possession of the premises. The attorney stated that he would go there with defendant and at once take the possession, and defendant replied not just at that moment, for there were some things which he wished first to remove. He made a claim for improvements he had made on the premises under the former term, but he said as the plaintiffs had demanded possession they might take the premises, and he would bring his action for the improvements. Nothing further being done, the plaintiffs, on the 2nd of October, commenced this action.

A verdict was taken for the plaintiffs, with leave to the defendant to move the court to enter a verdict for him, if the court should be of opinion upon the evidence that the defendant was entitled to six months' notice to quit before action brought.

*Campbell*, Q. C., obtained a rule *nisi* to enter a verdict for the defendant.

*Richards*, Q. C., shewed cause. He cited *Hegan v. Johnson*, 2 Taunt. 148; *Dunk v. Hunter*, 5 B. & Al. 322; *Regnart v. Porter*, 7 Bing. 451; *Mechelen v. Wallace*, 7 A. & E. 54; *McInnes v. Stinson*, 8 C. P. 34; *Vincent v. Godson*, 4 DeG. M. & G. 546; *Whitehead v. Clifford*, 5 Taunt. 618; *Grimman v. Legge*, 8 B. & C. 324; *Nickells v. Atherstone*, 10 Q. B. 944; *Dodd v. Acklom*, 6 M. & Gr. 672; *Cannan v. Hartley*, 9 C. B. 634; *Doe Burr v. Denison*, 8 U. C. R. 185; *Price v. Worwood*, 4 H. & N. 512.



*Campbell*, Q. C., contra, cited *Doe Lynde v. Merritt*, 2 U. C. R. 410.

ROBINSON, C. J.—The defendant in this case being served with the writ of ejectment, gave notice that “*besides denying the plaintiffs’ title*” he claimed a right to the possession as plaintiffs’ tenant. But his putting the plaintiffs to proof of title by giving them notice that he denied it was a disclaimer, and disabled him from insisting on a notice to quit. Though he could not in fact at the trial put the plaintiffs to proof of title, yet *quantum in illo* he disclaimed.

Again, after what occurred between the plaintiffs’ agent and the defendant on the 17th of September, the defendant could not set up as a defence to the ejectment the want of notice to quit, for he had declared himself ready and willing to leave, and only wanted time, he said, to remove some things from the house.

It was not shewn or pretended that he had not time allowed him to do this, and when the plaintiffs found he would not go, and brought their action three weeks afterwards, the defendant could not be allowed, I think, to retract from what he had said he would do, and thus throw the costs of the ejectment on the plaintiffs.

This view of the case is independent of the point made on the part of the plaintiffs, that a person in under an agreement to take a lease, and then not accepting a lease, cannot insist on being looked upon as a tenant. I think it probable that this objection might not be found tenable under the circumstances.

In my opinion the rule should be discharged.

BURNS, J.—I take it to be quite clear from the cases of *Knight v. Benett*, (3 Bing. 361,) and *Doe Westmoreland v. Smith*, (1 M. & R. 137,) and *Doe Thompson v. Amey*, (12 A. & E. 476,) that after the defendant had paid a year’s rent pending the negotiation for the new lease, he was legally in the position of being a tenant from year to year; and the question is whether that position was altered in consequence of what took place on the 17th of September, 1860, or afterwards.

It does not appear to me this case comes within the case of *Doe Lynde v. Merritt*, (2 U. C. R. 410,) because, although the defendant was in possession upon a verbal arrangement in that case for four years, yet long before the expiration of the first year the parties entered into a new agreement, under which the defendant agreed to give up and surrender at the end of the first year. It was quite competent for the parties to make such new arrangement, and when made it was reasonable to hold the defendant to it.

In this case the plaintiffs after the payment of the year's rent treated the defendant still as tenant, for a distress was made for another quarter's rent, but that was abandoned upon the idea that they had a right to treat the defendant as tenant at will, and to determine that tenancy by a demand of possession. Accordingly, on the 17th of September a demand of possession was made, and the defendant said in answer to it, that it was just what he wanted, and he would give up the possession, but when the plaintiffs' attorney desired to follow that up by having the possession given at once, the reply was, not just then, as the defendant desired to remove some things first. The plaintiffs were not in a legal position to terminate the tenancy by a demand of possession, and the only question there can be is whether when the demand was made the defendant assented to it, and whether what he answered to the demand and what took place was equivalent to a new agreement, by which the yearly tenancy was put an end to, and whether from thenceforward the defendant was a trespasser.

I am not able to see it in that light. Had the defendant quitted the premises in consequence of that demand, then no doubt, although the demand was not legal, yet by complying with it there would be a surrender of the term. I do not see that the defendant saying the demand of possession was just what he wanted, and that the attorney might go and take possession, when that was accompanied by declining to give up until he had removed his things, converted the tenancy from year to year into one at will, or that such answer amounted to an agreement which would enable the plaintiff to treat the defendant as a trespasser thenceforth.

No time was agreed upon when possession should be given, and no time fixed when the defendant's things should be removed, and it was quite plain the plaintiffs' attorney did not go to the defendant with any idea that he was making any new arrangement by which the position of landlord and tenant was to be changed, for the attorney went simply to demand possession on the idea that the defendant was then nothing more than a tenant at will. If the defendant chose to remain, as he did do, and hence this action, I do not see that his position was at all altered by what took place, or that there was any new perfected agreement definitely come to between them.

Then has he disabled himself from claiming to be still the plaintiffs' tenant, and entitled to have the regular notice to quit? It does not appear to me he has. I do not think there was any conversion of the yearly tenancy, which then existed, into a holding which entitled the plaintiffs to sue at once. The notice which the defendant gave, after being served with the writ of ejectment, is only a denial of the plaintiffs' title to the possession of the premises, and not a denial of the title to the land. If the plaintiffs be not entitled to the possession without giving the six months' notice to quit, then the defendant's notice of claim is right, and it is true, as the defendant says in his notice, that he is entitled to the possession as tenant to the plaintiffs. There is no inconsistency between the two statements, and no putting the plaintiffs to prove title to the land. The question of possession is alone in dispute, and the tenant may claim a right to that against his landlord.

McLEAN, J., concurred with the Chief Justice.

Rule discharged, *Burns, J.*, dissenting.

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TYSON V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

*Neglect to give signals—Collision—Mismanagement of plaintiff—Liability.*

Where a railway train in approaching a crossing neglects to give the proper signals, the company will not be relieved from liability because the person whose cattle were run over did not take the best means to avoid the accident, or because his horses were unmanageable.

ACTION for the loss of a mare and destruction of a waggon of the plaintiff, through the negligence of defendants, in omitting to give the proper signal of the approach of one of their trains to a road crossing.

*Plea*, not guilty, by Consol. Stats., ch. 66, sec. 83.

At the trial, at Berlin, before *Hagarty*, J., a verdict was found for the plaintiff for \$130.

*Bell*, (of Belleville,) obtained a rule *nisi* to enter a non-suit on the following exceptions taken at the trial: 1. That there was no evidence to prove the plaintiff's right to recover. 2. That the accident was shewn to be attributable to the plaintiff's horse being unmanageable, and to the want of care in the servant. 3. That the plaintiff did not use caution to avoid the accident—or for a new trial on the law and evidence.

*Thomas Miller* shewed cause, and cited *Shields v. Grand Trunk R. W. Co.*, 7 C. P. 111; *Butterfield v. Forrester*, 11 East 60; *Bridge v. Grand Junction R. W. Co.*, 3 M. & W. 244; *Smith v. Dobson*, 3 M. & G. 59; *Davies v. Mann*, 10 M. & W. 546; *Martin v. The Great Northern R. W. Co.*, 16 C. B. 197.

*Galt*, Q. C., supported the rule, citing *Tuff v. Warman*, 5 C. B. N. S. 585.

The facts are stated in the judgment of the court delivered by

ROBINSON, C. J.—The plaintiff's mare was killed by collision with the defendants' railway train, at a point where the railway crossed a highway.

The neglect complained of was that the defendant's servants omitted to ring a bell or sound a whistle until within

24 or 25 rods of the crossing, instead of giving the signal at the distance of 80 rods, as the law requires.

The plaintiff's complaint of omission in this respect was abundantly supported by evidence.

On the other hand, the defendants' conductor in charge of the train, the engine-driver, and the baggage-man, all swore positively that the whistle was sounded before the train got to within 80 rods of the crossing. Two of them said that it was sounded when they were 120 rods distant.

The evidence was so contradictory that the jury had to determine on which side the evidence preponderated. We think we cannot find fault with their verdict; we certainly cannot feel satisfied that it was wrong. It is remarkable that no passenger in the train was called as a witness on either side.

The evidence was of that character that a verdict given either way ought to settle that question of fact. We mean, as to whether the proper signals were given in time.

It does not appear to us that there is any ground for raising a question of law in the case, such as is attempted to be raised by the rule. Where there is a neglect to give the proper signals, and an accident happens at the crossing, we do not think the company can be exonerated from liability, by shewing that the man who suffers by the accident did not manage so well as he might have done under the circumstances, or that his horse was restive and unsteady.

All people have not equal judgment, nor equal presence of mind, nor equal experience in such matters. If those signals which the law requires are given, then the company will in general be safe from liability, and people must keep out of the way at their peril; but where that precaution, which should never be neglected, and can be always easily observed, is omitted, the train may come unexpectedly upon the person travelling along the road, and its approach may not happen to be observed from various causes; and he has not the chance in consequence, which the law intends he shall have, of considering what he is to do, or he has not time to do it.

It is not to be expected that none but steady and well

broke horses and skilful drivers will be using the road ; and it does not lie in the mouth of a railway company to say, "If we did not give the proper signals to announce our approach, still it would not have signified if you had been quick and sharp, and had kept a good look out, and had made no mistake in your hurry ; and if your horse had been steady and manageable, and had had sense enough not to be frightened."

These cases of collision on railways are among the most unsatisfactory that juries have to deal with, from the difficulty of getting clearly at the real facts. On the one hand, when the signals have been properly given, it seems generally possible to find persons who having been either in or near the train are ready to give evidence that they heard no bell or whistle, and this may well have happened from their not thinking of it at the moment, and so not noticing the signals. And, on the other hand, there is, we must say, too much reason to fear that a neglect to give the signals at the proper time, and to continue them as they proceed to the crossing, is a matter of very common occurrence, so much so as to make it incumbent on railway companies for their own sakes to be most earnest with their servants upon that point.

We do not think we should set aside this verdict, especially as it is not of large amount.

Rule discharged.

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### MCLEOD V. MCKAY AND KENNEDY.

*Joint note—Mortgage by one maker—Merger—Pleading.*

To an action on a joint promissory note made by M. and K., each pleaded separately that after the note fell due, M., by indenture, covenanted with the plaintiff to pay him \$319, (a sum less by \$2.80 than the amount of the note,) with interest at 15 per cent., in one year, and delivered said indenture to the plaintiff, who accepted it; and that the money mentioned in the declaration and in the indenture was the same.

*Held*, on demurrer, pleas good, though the indenture was not alleged to have been accepted in satisfaction, and the sum secured by it was less than the note.

APPEAL from the county court of Oxford.

Action on a promissory note made by defendants, on the 9th of April, 1857, for £80 9s., payable six months after date to the plaintiff.



*Plea*, by defendant McKay, that by indenture, dated the 11th of February, 1858, and after the accruing of the causes of action in the declaration, made between the said McKay and the plaintiff, the said McKay covenanted with the plaintiff to pay to the said plaintiff \$319, with interest from the date, at the rate of fifteen per cent. per annum, in one year from the date of said indenture, and delivered the said indenture to the plaintiff, who then accepted the same from defendant; and the defendant further says that the said sums of money in the declaration and in the said indenture mentioned are the same identical moneys, and not other or different moneys; by means whereof the said cause of action became merged and discharged.

The defendant Kennedy in another plea set up the same mortgage as a bar to the action against him on the note.

The plaintiff demurred to each plea, on the ground that the joint debt of the two defendants could not be merged by the consent of one only.

On this demurrer judgment was given for defendants, and the plaintiff appealed.

The learned judge of the county court referred in his judgment to *Loomis v. Ballard*, 7 U. C. R. 366; *King v. Hoare*, 13 M. & W. 494; *Harris v. Dunn*, 18 U. C. R. 352; *Bell v. Banks*, 3 M. & G. 266; *Nicholson v. Revill*, 4 A. & E. 675; *Mathewson v. Brouse*, 1 U. C. R. 272.

*D. G. Miller*, for the appellant.

*Crombie*, contra, cited *Siddall v. Rawcliffe*, 1 Cr. & M. 487; *Bedford v. Deakin*, 2 B. & Al. 210.

ROBINSON, C. J., delivered the judgment of the court.

We think the judgment of the county court was correct, for the plea of merger in the security given by mortgage by the principal debtor was a good defence.

I refer to *Kerr et al. v. Hereford et al.* in this court, (17 U. C. R. 158,) to the *Commercial Bank v. Cuvillier*, (18 U. C. R. 378,) in addition to the cases cited, and to *Bell v. Banks*, (3 M. & Gr. 258,) and especially to the judgment of *Maule, J.*, in that case.

There are two grounds, however, peculiar to this case, on which we have some doubt. This mortgage was not given till after the breach of the contract upon the note, and therefore it should more properly have been pleaded by way of accord and satisfaction, which is not done here. But still if it has the effect in law, as we think it has, of extinguishing *ipso facto* the demand upon the note against the joint contractor who gives it, it does equally by law discharge the other joint contractor, that is, where no agreement to the contrary appears; and if the legal effect of giving the mortgage is to discharge both, where nothing appears to shew that the remedy upon the note was intended to be reserved against both or either, then we think, under the present system of pleading, the defence cannot be held insufficient because it is not put in a shape inconsistent with fact. If we must hold that both are discharged without any proof of an agreement to accept in satisfaction, then it cannot be necessary in point of substance to aver what could not be proved, and is not necessary to make the defence a good one.

Then there is here the further circumstance, that the debt secured by mortgage is less by 14s. than the debt due in the first instance by the note. But the note was long due when the mortgage was given. The interest and a trifle more may have been paid, thereby making the amount a little less, and the plea states the debt to be the same.

Appeal dismissed with costs.

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### REGINA V. REOPELLE.

*Indictment—Forgery—Order for payment of money.*

RENFREW, June 13th, 1860.

“Mr. McKAY,

“Sir—Would you be good enough as for to let me have the loan of ten dollars for one week or so, and send it by the bearer immediately, and much oblige—Your most humble servant.

(Signed) J. ALMIRAS, P. P.”

*Held*, not an order for the payment of money, within the Consol. Stats. C., ch. 94.

The prisoner was tried and convicted at Perth, before

*Robinson, C. J.*, upon an indictment which charged him with feloniously forging "an order for the payment of money" with intent to defraud one William McKay, contrary to the statute.

The instrument or paper forged was in these words :

RENFREW, June 13, 1860.

Mr. McKay,

SIR—Would you be good enough as for to let me have the loan of ten dollars for one week or so, and send it by the bearer immediately, and much oblige your most humble servant.

(Signed) J. ALMIRAS, P. P.

The defendant was a French Canadian youth. It was clearly proved that he forged this writing in the name of J. Almiras, who was the Roman Catholic parish priest in the village of Renfrew, who had dealings with McKay, a store-keeper in the village, to whom it was addressed.

McKay gave the ten dollars to the person who brought the writing, and who, it appeared by the evidence, was not the prisoner, but some one by whom he had sent it. The grand jury ignored the count for uttering.

It did not appear that Almiras had any money in McKay's hands, or any right to draw upon him, but being a customer of McKay, in whom McKay had confidence, the latter paid it at once, supposing the signature to be genuine.

The case was very clear upon the evidence. The only doubt was whether the writing could be treated as "an order for the payment of money," and the prisoner having been found guilty, the learned chief justice reserved that point for the consideration of the Court of Queen's Bench.

*R. A. Harrison*, for the Crown, cited *Regina v. Tuke*, 17 U. C. R. 296, Chy. Stats., vol. ii., 229, note.

ROBINSON, C. J., delivered the judgment of the court.

The sole question is whether this instrument is an order for the payment of money within the statute, ch. 94, of the Consolidated Statutes of Canada. We are of opinion that it is not. The case is distinguishable from *Tuke's case*. (17 U.



C. R. 296.) This is no order for the payment of money, as it appeared to us the writing in Tuke's case was, although it had the words "please let," &c., and "You will oblige," &c., which are mere words of courtesy, and do not make the instrument less an order. They are often used in bank cheques, even where the person signing them has a perfect right to draw in a more peremptory style.

This is not an instrument of any mercantile or commercial character whatever. It is merely a letter soliciting a loan, and for the money advanced upon it no action would lie upon the instrument as an inland bill or draft, but only for money lent, of which the writing would be evidence. At the utmost it is a *request* to pay money, which is not what it is called in the indictment, and upon which indeed the defendant could not have been indicted, as he might have been upon a request to deliver goods.

We think the prisoner ought not to have been convicted, and shall so certify.

Conviction set aside.

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### SHAW v. ROSS.

*Action for land sold—Plea, payment—Equitable replication.*

To a declaration on the common count for land sold, defendant pleaded payment, and the plaintiff replied on equitable grounds, as to £316, part of the money claimed, that the cause of action was for land conveyed by the plaintiff to defendant by a certain indenture, in consideration of £930, the receipt whereof was then acknowledged; that notwithstanding said acknowledgment the defendant had not paid the said sum of £316, but the same remained due, and defendant since the date of this indenture had always been in possession of the land.

*Held*, on demurrer, a bad replication, as shewing the plaintiff's right to be an equitable one only.

DECLARATION on the common counts, for land sold and conveyed, for interest, and on account sated.

*Plea, payment.*

*Replication*, on equitable grounds, so far as the plea relates to the sum of £316 12s. 11d., parcel of the moneys in the declaration mentioned, that the cause of action in the declaration mentioned is for a messuage and land sold and conveyed by the plaintiff to the defendant, in and by an in-

indenture made on the 1st of September, 1855, in pursuance of the act to facilitate the conveyance of real property, between the plaintiff and the defendant, under their hands and seals, by which indenture it was witnessed that the plaintiff, in consideration of the sum of £930, then paid by the defendant to the plaintiff, the receipt whereof was then acknowledged, did grant unto the defendant, his heirs and assigns for ever, the messuage and lands aforesaid; and the plaintiff saith that, notwithstanding the said acknowledgment of payment of the said sum of £930, in the said indenture acknowledged, and the estoppel thereby made, the defendant hath not in fact paid the said sum of £316 12s. 11d., parcel thereof, but the same remains due and unpaid from the defendant to the plaintiff, and the defendant hath not before action satisfied and discharged by payment the plaintiff's claim to the said sum of £316 12s. 11d., or any part thereof, as in the said plea alleged. And the plaintiff further saith that from and ever since the day of the date of the said indenture, the defendant hath been in possession of the said messuage and lands.

*Demurrer.*—That the said replication admits that the said plea is a good answer in law to the declaration, and admits that the plaintiff is estopped at law by his deed from maintaining his action, and only attempts to shew grounds for maintaining it in equity, whereas if the plaintiff's right is an equitable right his remedy is only in equity, and not in a court of law.

That complete justice cannot be done by this court in the matter set up by the said replication, inasmuch as this court has already decided in this cause that the matters alleged in the defendant's second plea, and which disclose equitable rights inconsistent with the plaintiff's rights to the said moneys, cannot be investigated by this court.(a)

*C. S. Patterson*, for the demurrer, cited *Shaw v. Ross*, 17 U. C. R. 257; *Gulliver v. Gulliver*, 1 H. & N. 174; *Dodgson v. Scott*, 2 Ex. 459; *Perley v. Loney et al.*, 18 U. C.

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(a) See *Shaw v. Ross*, 17 U. C. R. 257.

R. 429; Schlumberger v. Lister, 6 Jur. N. S. 729; Neave v. Avery, 16 C. B. 328; Wild v. Hillas, 32 L. T. Rep. 186; Bennett v. Powell, 3 Drewry 329.

*Richards*, Q. C., contra, cited *Wood v. Dwarris*, 11 Ex. 493; *DePothonier v. DeMattos*, 1 E. B. & E. 461; *Vorley v. Barrett*, 1 C. B. N. S. 225.

ROBINSON, C. J., delivered the judgment of the court.

In our opinion this equitable replication to the defendant's plea of payment is not a good answer to it. The plea is one of payment in the ordinary form. The plaintiff cannot object to that as an insufficient defence; and he does not in terms deny its truth, but he seeks to evade it by anticipating the proof which he supposes the defendant will offer in support of his plea. This replication, as it seems to us, amounts in effect to saying that the plaintiff has no remedy at law in the face of his receipt under seal for the purchase money, and that he therefore comes into a court of law with an equitable case. If he had set out in his declaration all the facts which he states in his replication, would he have succeeded on such a declaration? We think not, though a court of equity would treat the vendee as holding the unpaid purchase money in his hands as trustee for the vendor.

Judgment for defendant on demurrer.

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### THORPE V. OLIVER.

*False imprisonment—Evidence of arrest—Liability of magistrate.*

In an action for false imprisonment, it appeared that the defendant, as a justice, issued a warrant against the plaintiff, upon a complaint for detaining the clothes of one K.: that the plaintiff, on being told by the constable that he had the warrant, went alone to defendant, heard the evidence, was allowed to go away without giving bail, and returned the next day, when he was discharged.

*Held*, that no imprisonment was proved, and that defendant, having jurisdiction over the subject matter of the complaint, was not liable in trespass, even if the information were insufficient in point of form.

APPEAL from the county court of Oxford.

This was an action for assault and false imprisonment.



*Plea*, not guilty, by statute, Consol. Stats. U. C., ch. 126, secs. 1, and 10 to 17 inclusive.

At the trial, it appeared that what was complained of as an arrest took place under a warrant issued by defendant, as a justice of the peace, upon a complaint of one K., which was dismissed upon the hearing, that the plaintiff had detained his wearing apparel after he, K., had tendered the full amount to him for board.

The learned judge ruled that upon the evidence, which is sufficiently stated in the judgment of this court, no arrest was shewn, and that the defendant was not liable unless he acted maliciously, which, if true, should have been charged in the declaration.

The jury thereupon found for defendant. The plaintiff afterwards obtained a rule *nisi* for a new trial for misdirection, which was discharged, and he appealed from the judgment.

*Beard*, for the appellant, cited *Harris v. Dignum*, 29 L. J. Ex. 23; *McIntosh v. Demeray*, 5 U. C. R. 343; *Riddiford v. Warner*, 4 C. B. N. S. 194; *Edwards v. Hodges*, 15 C. B. 477; *Shea v. Choat*, 2 U. C. R. 211; *Addison on Torts*, 400—417, 514; Consol. Stats. U. C., ch. 126, sec. 2; ch. 75, sec. 4; 10 & 11 Vic., ch. 23.

*C. S. Patterson*, contra, cited *Bross v. Huber*, 18 U. C. R. 282; *Graham v. Smart*, *Ib.* 482; Consol. Stats. U. C., ch. 75, secs. 6, 7.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the judgment appealed from was correct.

We do not think that an imprisonment in this case was proved. The plaintiff was not arrested by the constable; but on being told by the constable that he had a warrant against him, he went of his own accord and alone to the justice, heard the evidence read by the justice, and was then allowed to go away as he came. He returned the next day, and was discharged. Whether the justice would have detained him at any time during the investigation, if he had attempted to leave the room, we can only conjecture. We

only know that he took no bail from him, but let him go where he pleased after the examination on the first day, and that the plaintiff returned next morning.

We see no proof of an interference with the plaintiff's personal liberty, either by the justice or by the constable. When the plaintiff made his appearance before the justice, which he did without being brought by the constable, the justice naturally and properly went on to state to the plaintiff the complaint which had been made against him. The plaintiff came voluntarily in order to hear it, and departed when he had heard it.

Then, again, we think the justice, upon the information that had been made before him, was clearly within the protection given by the Consol. Stats. of U. C., ch. 126, and not liable to be sued in trespass. He had jurisdiction over the subject matter of the complaint, under the 6th and 7th clauses of ch. 75; and if he took an erroneous view of the sufficiency of the information in point of form to shew a sufficient case under the act, that would not make him liable to be treated as a trespasser.

It is not necessary in all cases to leave it as a question for the jury whether a justice was acting in the execution of his duty, though in some cases it is proper. Here it is perfectly evident that the defendant was so acting. There was no contradiction in the testimony, nor the slightest ground afforded by it for supposing that the justice acted in wilful disregard of the law. It is evident that he did not.

Appeal dismissed, with costs.

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### SAGE V. CALLAGHAN.

#### *Amendment.*

*Held*, that under the circumstances stated below, in an action for seizing two horses, the judge was justified in allowing a waggon and set of harness to be inserted also in the declaration at the trial, the defendant's counsel objecting, but admitting that he was not taken by surprise by such amendment.

ACTION for unlawfully converting to defendant's use one horse, one mare, one double waggon, and set of double harness, and one pair of whipple-trees.

*Pleas*—not guilty, and that the goods were not the plaintiff's. At the trial at Woodstock, before *Hagarty*, J., the learned judge allowed the record to be amended, by inserting the waggon and harness in addition to the horses; the defendant's counsel objecting, but not asserting that he was taken by surprise; and a verdict was found for the plaintiff for £75.

*Beard*, obtained a rule *nisi* for a new trial, on the ground, among others, that this amendment had been improperly allowed. He cited the Common Law Procedure Act, sec. 222; *Bye v. Bower*, 1 Car. & Marsh, 252; *Wilkin v. Reed*, 15 C. B. 205; *May v. Footner*, 5 E. & B. 507; *Brennan v. Howard*, 1 H. & N. 138.

*D. G. Miller* shewed cause, and cited *Edwards v. Levy*, 2 Fos. & Fin. 96, note *b*; *St. Losky v. Green*, 2 Fos. & Fin. 106.

The facts appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We have read the evidence, and, in the first place, we think that the judge was well warranted in allowing the waggon and harness to be inserted in the record in addition to the horses. The whole were seized at one time by the sheriff, as being the property of Redmond Sage, against whom he held an execution at the suit of this defendant, Callaghan. The plaintiff might no doubt have been entitled to the horses, and not to the waggon or harness; and if he had intended to claim the horses only, and the defendant understanding that, had come prepared only to vindicate his right to have the horses seized, it would clearly have been wrong to have allowed the waggon and harness to be added during the trial, by way of amendment, at least without postponing the case to the next assizes, if the defendant had desired it, and making the plaintiff pay the costs of the day; but it being candidly acknowledged at the trial on the defendant's part, that he could not complain that he was taken by surprise by having the right to seize the waggon and harness brought in question, we think the judge had a discretion to allow



the amendment. If he had not allowed it the defendant would have been harrassed with another action.

The case went fairly to the jury, and though there may be good reason to doubt the good faith of Redmond Sage, yet the evidence fully supports the verdict, and we discharge the rule.

Rule discharged.

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### MCKAY V. FEE.

*Interest—Recovery of principal and six per cent.—Subsequent action on agreement to pay a higher rate.*

Plaintiff sued defendant as maker and A. as endorser of two notes, adding a count for interest, and at the trial to support this count he offered in evidence a written undertaking signed by defendant, and a similar one by A., to allow him interest at the rate of thirty per cent., until payment, in consideration of the plaintiff allowing three months' time. The learned judge ruled that the action being joint, evidence of a separate liability against either defendant could not be received, and the plaintiff then took a verdict against both defendants for the amount of the notes and interest at six per cent. After judgment had been entered up on this and satisfied, he sued defendant on his undertaking, to recover 24 per cent., the balance of interest agreed to be paid by it.

*Held*, that the judgment recovered was a bar to any further claim for interest upon the same notes.

This was a special case stated for the opinion of the court, as follows :—

#### CASE.

An action was commenced in the Court of Common Pleas by the above named plaintiff against the above named defendant as maker, and one Robert Armour as endorser, of two promissory notes, the one for the sum of \$231.60, and the other for the sum of \$1915.15. A count was added in the declaration for interest.

At the trial of the cause, which took place at the fall assizes for 1859, at Toronto, evidence was offered to support the court for interest by putting in the following memorandum.

"I undertake to allow Mr. McKay the holder of my promissory notes for \$231.60, and \$1915.15, respectively, both of which matured on the 27th of December, 1858, interest upon these amounts at the rate of  $2\frac{1}{2}$  per cent. per month, until the date of payment, in consideration of the said McKay having consented to give me three months' time for payment.

"(Signed,) JOHN FEE.

"Bowmanville, 14th January, 1859."

And a similar memorandum signed by the defendant Robert Armour.

At the trial, at Toronto, before *Draper*, C. J., the learned judge ruled that being a joint action against maker and endorser, evidence could not be offered of any separate liability against either. The plaintiff abandoned any claim on the memorandum in that form of action, and a verdict was taken against the defendant as maker, and the said Robert Armour as endorser, for the amount of the two promissory notes, and interest up to date of verdict at six per cent., and judgment for the same was entered upon the 24th day of October, 1859, which judgment has been since satisfied.

This action has now been brought against the defendant to recover interest on the memorandum above mentioned.

It is admitted that the period for which the six per cent. was taken covers that portion of the period for which the interest is now demanded at the greater rate up to the date of the entry of the said judgment, and that the principal sums are identical, but the plaintiff demands twenty-four per cent., being the thirty per cent. in the memorandum, less six per cent. recovered.

The defendant contends that the judgment recovered for the six per cent. is a bar to the recovery of any other amount of interest on the above mentioned memorandum, and that the verdict rendered on the said notes with legal interest, and the judgment entered thereon, is a complete bar to the recovery of the interest claimed in this action, and that this action must fail.

If the court shall be of opinion that the judgment recovered for interest at the rate of six per cent. on the original amount due up to the date of the said judgment, does not bar the recovery of the interest claimed in this action, judgment is to be entered for the plaintiff for the amount of interest at the rate of twenty-four per cent. a year on the principal sum, from the date of said agreement to the date of payment, or a less sum up to the date of entering judgment in this action, or less rate, as the court may see fit to award.

If the court shall be of opinion that no portion of the said twenty-four per cent. can be recovered after recovery of judgment for six per cent., then judgment is to be entered for the defendant with costs of suit.

*Cameron*, Q. C., for the plaintiff, cited *Seddon v. Tutop*, 6 T. R. 607; *Hadley v. Green*, 2 Cr. & J. 374.

*McMichael*, contra, cited 1 B. & B. 432; *Lord Bagot v. Williams*, 3 B. & C. 235.

ROBINSON, C. J., delivered the judgment of the court.

We think there can be no further recovery upon the promissory notes after judgment obtained against both the parties for the sums payable with six per cent. interest, which judgment moreover has been satisfied. The interest was an accessory to the debt, damages in effect for detaining it, and such interest as the plaintiff shewed himself entitled to in the opinion of the court and jury on the former trial covered the whole period up to the judgment. Can there then be another recovery for interest for forbearance of the same debt, for the same period of time? We think there cannot be.

Admitting that the special agreement for paying so exorbitant a rate of interest could be enforced against each on his separate undertaking, the plaintiff might have sued each separately, and might have advanced in support of each action this special agreement signed by each defendant respectively.

Whether it was quite clear that he could not have the same advantage in an action under the statute against the maker and endorser, we need not give any opinion. The learned judge at the trial decided that question at the time, and the plaintiff acquiesced, and took his verdict for the interest at six per cent., and has entered judgment on it. We think after this he can sue for no more interest on those notes, though he has endeavoured to recover upon the special agreement respecting interest, as for a distinct and independent cause of action.

Judgment must in our opinion be entered for the defendant.

Judgment for defendant.

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### ROBINSON V. GRANGE.

*Appeal from county court—Application to amend judgment—Delay.*

On appeal from a county court this court reversed the judgment below, discharging a rule *nisi* to enter a verdict for defendant, which appeared by the appeal books to have issued, and made absolute that rule. Six terms afterwards the plaintiff moved to amend the judgment by granting a new trial, on affidavits that no leave was reserved in the court below to enter a verdict for defendant; but this court refused to interfere.

In this case an appeal came from the county court of



Brant, from a judgment given there, discharging a rule *nisi* to enter a verdict for defendant, (instead of a verdict that had been given for the plaintiff on the trial,) or to grant a new trial on the law and evidence, &c.

This court considered that the plaintiff had failed in making out a cause of action against the defendant for neglect in not seizing and selling under a *fi. fa.* at Robinson's suit; and the principal ground of the judgment was, that the plaintiff failed in shewing that the stock in a building society, which he had desired the sheriff to seize and sell, belonged to the debtor, Banks. They reversed the judgment discharging the rule, and made it absolute for entering a verdict for defendant, as they thought the court below should have done, looking at the terms of the rule *nisi*. This judgment was given in Easter Term, 1859, and is reported in 18 U. C. R. 260.

*R. A. Harrison* in this term moved to amend the judgment by granting a new trial, instead of ordering a verdict for the defendant to be entered, upon an affidavit, stating that at the trial in the county court no leave to enter a verdict for the defendant was reserved. He cited *Sutor v. McLean*, 8 C. P. 205; *Walker v. King*, 6 L. J. Ex. 184 N. S.

*M. C. Cameron* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We decline altering a judgment given in court six or seven terms ago. We took it for granted that the rule *nisi* was ordered in the terms in which it was set forth in the appeal book before us, and we disposed of it accordingly. No objection was taken to the form in which the rule *nisi* had issued on the argument of the appeal, nor was it stated in affidavits before us in the argument of the rule in the county court.

If there was any thing wrong, the plaintiff had ample time and opportunity to have it made right while the case was pending, after the trial in the court below, and afterwards while the appeal was pending; and if he could be excused for omitting this, at least he should not have allowed

such a time to elapse without objecting after the judgment in appeal had been openly given in court.

Besides, there is really no object in a new trial, and if we could alter the judgment after the term in which it was given, we should not make such a precedent in this case, under the circumstances, when nothing wrong was done by this court as the appeal stood before us, and when no object would be gained by interposing.

Rule discharged.

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### THE QUEEN V. TISDALE AND SHAVER.

*Indictment—Extortion by magistrates—Joint offence.*

Where two defendants sat together as magistrates, and one exacted a sum of money from a person charged before them with a felony, the other not dissenting,

*Held*, that they might be jointly convicted.

*Held*, also, not indispensable that the indictment should charge them with having acted corruptly.

The defendants were tried at Hamilton, before *McLean*, J., and found guilty of extortion in exacting from one David Bantenhhammer, charged with felony before them as magistrates, 25s. as fees due to them as justices, and for fees for his arrest.

No objection was taken to the form of the indictment at the trial.

*Read*, Q. C., moved for a new trial on the law and evidence, or to arrest the judgment, because the indictment did not charge them with acting corruptly. It was objected that no joint offence was proved against the defendants, for that, though they sat together, one only received seventy-five cents, as a fee which he claimed for the discharge of the defendant, the charge made against him not being (as they both thought) sustained by evidence.

ROBINSON, C. J., delivered the judgment of the court.

The courts do not quash indictments for extortion, but leave the defendant to demur, (*a*) and here we do not see

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(*a*) See *Rex v. Wadsworth*, 5 Mod. 13.

any defect in the indictment, for the word corruptly does not appear to be indispensable.

Two or more persons may be jointly convicted of extortion when they act together and concur in the demand. It is a misdemeanor, and all are principals.

We see no ground for a new trial, and do not grant a rule *nisi*. The demand was entirely illegal, and it is enforced by these two defendants sitting and acting together, neither dissenting. They cannot set up as a defence such extraordinary ignorance of the law as it would be necessary to believe they laboured under before it could be credited that they had fallen into a mistake as to their right to charge the defendant with costs in such a case, and under such circumstances.

Rule refused.

## ALEXANDER MACAULAY V. MARSHALL.

### *Interpleader—Estoppel.*

Where in an interpleader issue (the execution creditor being defendant) it appeared that the plaintiff had taken a bill of sale of the goods in question from the execution debtor while the *fi. fa.* was in the sheriff's hands: *Held*, that he was not thereby estopped from denying the debtor's title, this action not being upon the deed, and between other parties.

APPEAL from the county court of Hastings.

This was an interpleader issue to try the right to certain goods seized by the sheriff of Northumberland and Durham, under a writ of *fi. fa.*, delivered to him on the 21st of June, 1859, at the suit of Scott Marshall, defendant in the interpleader, against one Charles J. Macaulay.

The plaintiff in the interpleader, Alexander Macaulay, claimed under a chattel mortgage made to him by the execution debtor on the 19th of June, 1858, and filed on the 21st. On the 11th of July, 1859, under a purchase of the equity of redemption at a sale under a division court execution made in March, 1859, he took a bill of sale of the whole or part of the property from the debtor, which was filed on the 12th.

A nonsuit was moved for, on the grounds that the last bill



of sale having been taken by the plaintiff from the execution debtor while the *fi. fa.* was in the sheriff's hands, he was estopped from denying that the goods then belonged to the debtor; and that no claim could be made under the chattel mortgage, as it had not been renewed.

Leave was reserved to move upon these objections, and the *bona fides* of the transaction was left to the jury, who found for the plaintiff.

A rule *nisi* to enter a nonsuit pursuant to leave reserved was discharged, and the defendant appealed.

*Crombie*, for the appellant, cited *Ruttan v. Weller*, 14 U. C. R. 44; *Bell v. Peel*, 15 U. C. R. 593; *Cornish v. Abington*, 28 L. J. Ex. 262.

*Wallbridge*, Q. C., contra, cited *Tay. Ev.*, sec. 769.

The facts are further stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

It was a rule *nisi* for nonsuit only that was moved for, and granted in the court below, and the judgment discharging that rule *nisi* is appealed from. There was a good deal of reason afforded by the evidence to suspect a collusive transfer or mortgage between Charles Macaulay and this plaintiff, his brother, to avoid payment of Charles's debts; but there was evidence that upheld it, and the jury found in favour of the plaintiff, which settles the point of the *bona fides* in making the assignment, as the verdict has not been moved against.

As to the ground relied upon—that the taking of the bill of sale of July, 1859, from Charles Macaulay while the *fi. fa.* at this defendant's suit was in the sheriff's hands prevents all legal question as to this defendant's right to a verdict, because that is an admission by Alexander Macaulay that the property at that moment did not belong to himself, but to his brother Charles, in which case the *fi. fa.* must have bound it, and prevented its being disposed of by the bill of sale to the prejudice of this defendant—it is asserted, and there was evidence to that effect, that the bill of sale of July, 1859, did not cover all the goods now in question; and

if so any estoppel that could arise under it against the plaintiff could not determine the right against him in regard to all the property seized and claimed.

If this be so the judge could not have granted a nonsuit on that ground, though possibly he might have granted a new trial, notwithstanding it had not been moved for. That, however, would have been discretionary on his part.

As to the estoppel, we could not venture to hold the assignment made in July, 1859, to be an estoppel without seeing and examining it carefully, and it is not shewn to us. There might be some thing in the deed which would shew that it ought not to be treated as an estoppel. It might have been taken merely for confirmation of title, or to extinguish some interest which could not be taken in execution.

And at any rate, it could only be matter of observation to the jury as a strong fact in the case, to strengthen the belief from other evidence that Charles Macaulay was at that point of time owner of the goods. The judge could not have directed a nonsuit upon it in this action, not upon the deed, and between other parties.

The case of *Carpenter v. Bullen*, (8 M. & W. 209,) is much in point, and shews that what the plaintiff relies upon as a conclusive estoppel cannot be so treated.

In our opinion the appeal must be dismissed with costs.

Appeal dismissed.

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### O'MULLIN V. BISHOP AND MURPHY.

*Short absence of juror after close of case—Mistake—New trial refused.*

At the trial of an action for overflowing land, the jury were allowed to separate at the end of the first day, before the case was closed. After they had retired to consider their verdict next day, one juror was allowed to go out in charge of a constable, and on his return met the people coming out of the court-house, who told him that the court was over, and the jury dismissed for that day. He then went home, but was brought back by the constable in less than an hour, and came in with the rest of the jury in a short time to deliver the verdict for defendants. He swore that during his absence he had had no conversation about the suit, and no misconduct was imputed to defendants in the matter.

The court, under these circumstances, refused to disturb the verdict.

This was an action on the case for overflowing the plaintiff's

land, by wrongfully continuing a dam that had been erected across the Nation River.

At the trial, at Cornwall, before *Draper*, C. J., the jury found their verdict for the defendants.

*J. S. Macdonald*, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and on affidavits.

*Deacon* shewed cause, and cited *Rex v. Woolf*, 1 Chitty Rep. 401.

ROBINSON, C. J., (after stating and commenting upon the evidence, which was held to support the verdict.)

We think the only thing that requires to be considered in the case is whether the verdict should be set aside on account of the alleged misconduct of one of the jury, in separating himself from the rest after the case was closed, and continuing absent for about three quarters of an hour, without the consent of the constable who had him in charge. As to that matter, we have read the affidavits filed on each side respecting the absence of the jurymen, and do not think we should on that account set aside the verdict.

It appears clearly to have arisen from a mistake into which the jurymen and the constable who had charge of him naturally fell, from the circumstance of the jury having been allowed to separate on the night before, while the trial was yet unfinished. This jurymen, on the second day of the trial, soon after the jury had retired to the jury-room to consider their verdict, asked leave to go into the yard, and was allowed to go in charge of a constable. He was returning in a few minutes with the constable into the court, when they met the people issuing from the court house, and were told that the court was over for the day. The constable ran up stairs, leaving behind him the jurymen of whom he was in charge, and that jurymen, being told, as he swears, by one of the crowd that the jury had been dismissed for the night, went home to get his supper; but before he had supped the constable in whose charge he had been followed him to his house, and took him with him to the court again, when he joined the rest of the jury in the jury-room, and after a short



time they all came into court and delivered their verdict for the defendants.

The plaintiff was not deprived of the advantage of this juryman's opinion upon the case, for he came in as foreman with the verdict. It is sworn by the juryman that in the short time that he was absent from the rest of the jury he had no conversation with any one about this suit. There is no reason to suppose that any thing wrong was designed, or that any thing wrong was done.

The evidence upon the trial shewed no injury that could have appeared to the jury to call for any considerable damages, and there was evidence on the defendants' side quite sufficient to support what seems to have been the opinion of the jury, that there really was no cause of action proved, for that the plaintiff's land could not and was not affected by the dam complained of, but was a low swale, naturally wet, and that it had been quite as wet before the defendants' dam was erected as it had been since. It is true that there was evidence to the contrary, but upon the whole testimony it was at least uncertain whether the plaintiff had suffered any injury at all from the dam. The jury were all present when the verdict was delivered, and no dissent expressed by any of them. No improper conduct is attributed to the defendants, or either of them; the short absence of one of the jury, who had all been allowed to separate the night before, while the cause was yet unfinished, happened from mistake, and there is no reason to think that any injustice has arisen from the accident.

Rule discharged.

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# HAWORTH AND KESTEVEN V. FLETCHER.

*County court—Right of appeal—Omission to give bond in time—Assignment—Description of goods.*

Where in the county court a verdict is taken for the plaintiff, with leave reserved to move to enter it for defendant, an appeal will lie from the judgment on such motion.

This court will not refuse to hear an appeal properly entered, because the necessary bond was not given in time.

In an assignment the goods were described as “all the household furniture, goods, chattels, and effects, belonging to and being in the dwelling house of the said Burrowes, and which are enumerated and set forth in the second schedule hereunto annexed; and also the stock in trade, implements of business, and machinery in the said schedule enumerated and set forth.”

In the margin of the schedule different localities were mentioned, and opposite to them the goods specified, the articles in question being as follows:

STABLE AND COACH-HOUSE.—Three horses, three sets of harness, one straw cutter, one cow, one cutter, two buggies, &c. &c.

LUMBER YARD.—Two waggons, one pair of bob-sleighs, four wheel-barrows, tressels and scaffolding, *old lumber, &c., two thousand feet of oak and hardwood plank and boards, sixty thousand feet of prime assorted sizes, two thousand feet of flooring, one pair of timber wheels, one hand cart, two yard dogs, cut stone.*

*Held*, that the articles in italics were sufficiently described, and passed as stock in trade, and that the description as to the others was insufficient.

APPEAL from the county court of the united counties of York and Peel.

This was an interpleader issue to try the right to certain goods seized under a writ of *fi. fa.*, delivered to the sheriff on the 12th of April, 1860, at the suit of the defendant against one George K. Burrowes.

The plaintiffs claimed under an assignment from said Burrowes, dated the 11th of February, 1860, which was admitted, and found by the jury to have been made *bonâ fide*.

It was objected by defendant's counsel that the description of some of the goods assigned was insufficient, and a verdict was taken for the plaintiffs, with leave to defendant to move to enter a verdict for him for the whole or part of the property.

By the assignment, the said Burrowes assigned and set over to the plaintiffs, “all the household furniture, goods, chattels, and effects, belonging to and being in the dwelling house of the said Burrowes, and which are enumerated and set forth in the second schedule hereunto annexed; and also all the stock in trade, implements of business, and machinery in the said schedule enumerated and set forth.”

The schedule was headed “Schedule No. 2, mentioned and

referred to in the assignment of George Kirk Burrowes, containing a statement of the household furniture, stock in trade, implements, machinery, goods, chattels, personal estate and effects of the said George Kirk Burrowes."

In the margin of the schedule were mentioned the different rooms or places where the goods set opposite were, and among other articles were the following :

*Stable and coach house.*—Three horses, three sets of harness, one straw-cutter, one cow, one cutter, two buggies, &c., &c.

*Lumber yard.*—Two waggons, one pair of bob-sleighs, four wheel-barrows, tressels and scaffolding, old lumber, &c., two thousand feet of oak and hardwood plank and boards, sixty thousand feet of prime assorted sizes, two thousand feet of flooring, one pair of timber wheels, one hand-cart, two yard dogs, &c., &c., cut stone, &c.

After argument of this rule, it was made absolute so far as regarded the three horses, three sets of harness, one straw cutter, one cow, one cutter, two buggies, old lumber, &c., two thousand feet of oak and hardwood plank and boards, sixty thousand feet of prime assorted sizes, two thousand feet of flooring, one pair of timber wheels, one hand-cart, two yard drays, &c., &c., cut stone, &c.; and as to this property it was ordered that a verdict should be entered for defendant.

The plaintiffs thereupon appealed.

*R. A. Harrison*, for the respondent, objected that the appeal would not lie, this being in effect a judgment on a special case, and because the appeal bond was not perfected within the four days allowed, Consol. Stats. U. C., ch. 15, sec. 67, ch. 13, sec. 23; *Regina v. Wells*, 17 U. C. R. 545; *Harding v. Knowlson et al.*, *Ib.* 564. He cited also *Kingston v. Chapman*, 9 C. P. 130; *Rose v. Scott*, 17 U. C. R. 385; *U. C. L. J.* 217; *Sutor v. McLean*, 8 C. P. 205.

*Hector Cameron*, contra, cited *Wilson v. Kerr et al.*, 18 U. C. R. 470; *Fraser v. Bank of Toronto*, 19 U. C. R. 381.

ROBINSON, C. J., delivered the judgment of the court.

We see no objection to this appeal being entertained.



This is not a special case without pleadings or evidence. There is a complete record, on which the parties have had a trial in the county court. The course taken there, of reserving leave to move in term upon legal points raised at the trial, merely enables the judge to dispose of the legal objections so as to give final effect to them, without incurring unnecessarily the expense of another trial.

When he decides them afterwards in term, it is as if he had decided them at the trial, in which case no doubt his ruling could have been appealed from under the county courts act, Consol. Stats. U. C., ch. 15, sec. 67.

When points are reserved by consent, the parties in effect agree that the case shall be afterwards treated as if he had charged the jury, and the jury had found under his ruling for that party who according to his mode of disposing afterwards of the point reserved is found entitled to the verdict.

This, to be sure, with respect to appeals from the superior courts, is put more plainly by the appeal act, ch. 13, sec. 23, but we think the appeal admissible under the construction and effect that ought to be given to the section 67 of the county courts act.

Then as to the appeal being shut out by the want of giving a bond in time. We see no statement of facts as to the time of giving the security for the purpose of appeal, but it is evident that the appeal must have been entered in the first term of this court after the judgment, and that is all we know judicially of the matter.

If the party now appealing did not furnish a proper bond in time, he ran the risk of having judgment entered against him in the county court, from which he probably would not have been relieved. It is the defendant in this issue, the execution creditor, who appeals, contending that the plaintiff should not have recovered for as much as he has recovered.

Then as to the judgment, whether it is correct or not. We should have been furnished with a list of what had been seized on the defendant's execution, and of what portion of the things so seized were claimed by the plaintiffs, for such things only could be in question on the trial. Without this

we are really unable to deal so clearly and conveniently with the merits of the case as we could otherwise have done.

But this we do see, that the plaintiffs having a verdict in their favour at the trial for all they did claim, (be it what it might,) the defendant moved afterwards that a verdict should be entered in his (defendant's) favour as to *certain articles*. That is the whole extent of the rule *nisi*, which he obtained, and served on the plaintiff.

Then the learned judge acceded to what the defendant asked, except as to some of the articles mentioned in the rule, and by the judgment some of the goods claimed have in consequence been struck out from the plaintiffs' recovery.

The learned judge disallowed them, we suppose, as not coming under the designation of "*household furniture, or goods, chattels or effects belonging to, and in the dwelling-house of the assignor,*" nor "*stock in trade, implements of business, or machinery enumerated in the second schedule.*"

As to any thing that we cannot intend to have belonged to and been in the dwelling-house, they would not pass, we think, under the first words used: that is, "all the household furniture, goods, chattels and effects belonging to and being in the dwelling-house of the said Burrowes, and which are enumerated and set forth in the second schedule hereunto annexed." That is, we mean that they would not pass under the reference to the schedule simply because they were enumerated in it; and as that seems to apply to all the articles struck out, the next question is, whether they should not be held to pass under the other words, "and also all the stock in trade, implements of business, and machinery in the said schedule enumerated and set forth."

Burrowes' trade is described as that of a builder, and the following articles seem fairly to belong to his stock in trade: old lumber, oak and hardwood plank and boards, prime assorted sizes, (which we suppose means some kinds of lumber,) flooring, a pair of timber wheels, a hand-cart, and cut stone, and the two yard dogs, as belonging to the lumber yard; and they are all enumerated in the schedule.

We think that the reasonable inference from what is stated in the schedule is that this stock in trade was all on the

plaintiffs' premises upon Sayer street, and may be held to have been sufficiently described to comply with the statute.

The result of our opinion is that the judgment given below should be reversed, and the plaintiffs' verdict should be allowed to stand for all the articles except the three horses, three sets of harness, and straw cutter, one cow, one cutter, two buggies, two waggons; and as regards those articles the verdict for the plaintiffs should be set aside, and a verdict entered for the defendant.

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### PURDON V. PLAYFAIR.

#### *New trial—Affidavits of jurors.*

In an action for overflowing land, where a verdict had been found for the plaintiff, the court refused a rule *nisi* for a new trial, moved for upon the affidavits of two of the jurors that they had examined the premises since the trial, and were satisfied that the verdict was incorrect.

This was an action for overflowing the plaintiff's land, tried at Perth, before *Robinson*, C. J., in which the jury found for the plaintiff, and £30 damages.

*Richards*, Q. C., moved for a new trial on the law and evidence, and upon affidavits of two of the jury that a few days after the trial they visited and inspected the plaintiff's land, and found that the trees and herbage upon that part of it which was represented to have been injured were in a perfectly healthy state and not affected by back-water, and that they were now convinced that their verdict was incorrect, and if it remained would do injustice to the plaintiff.

ROBINSON, C. J., delivered the judgment of the court.

We think we should be taking an unprecedented course, and one that would be most injurious in its effects, if we were to allow the verdict to be set aside upon affidavits made after the trial by jurymen, of what they had discovered since the trial. They allege no mistake in deciding upon the evidence that was before them, but that they have been enquiring, and have ascertained certain facts since. If we were to interfere on such grounds, jurors who had decided a case would have



no rest, but would be besieged by applications of the parties to receive more evidence, and to try the case out of court.

The very point to which a very few of the jurors now swear was the main point in issue at the trial. Numerous witnesses were examined upon it on both sides, and either party could have called more if he had desired. A view also could have been had before the trial by the jury in a body if prayed for.

Rule refused.

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IN THE MATTER OF THE ARBITRATION BETWEEN THE CORPORATION OF THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM AND THE CORPORATION OF THE TOWN OF COBOURG.

*Separation of town from county—Arbitration—Consol. Stats. U. C., ch. 54, secs. 26, 358.*

Upon motion to set aside an award made under Consol. Stats. U. C., ch. 54, sec. 26, *Held*, that it was not necessary that such award should direct the town to pay any portion of the existing debt of the county, and that the arbitrators, finding that the whole debt had been incurred for making roads which had been of no benefit to the town, were justified in awarding that the town should pay nothing on account of such debt, and that the county should refund what the town had paid towards the construction of such roads.

The arbitrators did not take or file any oral or documentary evidence, (under sec. 358, sub-sec. 13,) but relied upon the knowledge which two of them had of the position of the municipalities towards each other with relation to money matters, and obtained the specific sums on which their award was based from the books of the county treasurer. These sums were shewn to the warden at the last meeting of the arbitrators, and their correctness was not disputed. *Held*, sufficient.

*Held*, also, that the arbitrators had no power to award as to costs, and that part of the award was set aside.

In Easter Term last, *Hodgins* obtained a rule *nisi* calling upon the corporation of the town of Cobourg, to shew cause why the award made by Thomas Scott, the arbitrator appointed by the corporation of the town of Cobourg, pursuant to sec. 26 of 22 Vic., ch. 99, and Lewis Wallbridge, the third arbitrator appointed by the said Thomas Scott, and the arbitrator appointed by the corporation of the United Counties of Northumberland and Durham, which award is dated on the 14th day of February, 1860, should not be set aside, on the following grounds:—

1. That the said award is contrary to the provisions of

the statute in that behalf, in this, that instead of directing what amount the said town shall pay to the counties for the existing debt of the counties, it directs that the town shall pay no sum whatever to the said counties for the existing debt of the counties.

2. That the arbitrators exceeded their authority in this, that they have awarded that the corporation of the said united counties shall pay a sum of money to the corporation of the town for the construction of roads and bridges without the limits of the said town.

3. That if the arbitrators have not so exceeded their authority they should have awarded what sum of money the said town should pay to the said united counties for the construction of roads and bridges within the said town.

4. That the arbitrators exceeded their authority in awarding that the said united counties shall pay the debt of the said counties for which the said town is jointly liable with the said counties, as forming part thereof at the time of the contracting of the said debt.

5. That the said arbitrators exceeded their authority, in awarding that costs shall be paid in the manner in the said award set forth, or in any manner or form whatever.

6. That the said arbitrators acted irregularly, in this, that they received evidence not under oath, and in other respects conducted the said arbitration in an illegal and irregular manner.

7. That the said award is in other respects illegal and void, upon grounds disclosed in affidavits and papers filed.

The resolutions of the respective councils, appointing each an arbitrator on behalf of their respective municipalities, were made rules of court.

The award was made on the 14th of February, 1860. It was executed by Thomas Scott and Lewis Wallbridge, Esquires, the former being the arbitrator appointed by the town of Cobourg, and the latter by him and Charles H. Vernon, Esquire, the arbitrator on behalf of the united counties. Mr. Vernon did not concur in the award.

This application was made on the 24th of May last, in Easter Term, and the delay in moving was accounted for by

shewing that the council of the united counties had no notice or knowledge of the award till April after it was made, and they then immediately applied for and obtained a copy.

It was sworn by the warden of the county that no copy of the award was served upon him, and that he first received information of it by rumour in April: that no copy had been filed with the clerk of the united counties, nor any evidence, nor statement, nor documents filed by the arbitrators, as the act requires: that he, the warden, attended the arbitrators, and made a statement of the relation between the two municipalities, but was not examined on oath, nor was any statement or minutes thereof taken down during his presence: that he believed no evidence on oath was taken by the arbitrators, nor any minutes of evidence taken or kept by them: that the debt of the united counties was at the time of the arbitration £115,000, contracted for the making of roads within the united counties, under the municipal loan fund act: that by a late statute of the province, the several local municipalities of the united counties were obliged to raise a rate of five cents in the dollar to pay the principal and interest of the loan: that in the year 1859, \$1680 was levied by the united counties upon the town of Cobourg for general purposes, and \$4056 as a special rate to pay off the said rate of five cents on the dollar, but that neither of these sums had been collected or paid to the united counties, and it was not known whether in making their award the arbitrators took into consideration the said indebtedness of the town of Cobourg to the said united counties.

The arbitrators seemed to have been appointed by resolutions in December, 1859.

The town was withdrawn from the jurisdiction of the united counties by by-law of the town of Cobourg, passed on the 5th of December, 1859, to take effect from the 31st of December, 1859, the by-law having been first (in November, 1859) approved of by the electors of the town.

The award of the two arbitrators executing it directed, among other things, that the town of Cobourg should pay no sum whatsoever to the united counties for the existing debt of the said counties; and that the united counties should forth-



with pay to the town of Cobourg £207, which the said town had heretofore paid for the construction of roads and bridges by the united counties without the limits of the said town; and further that the corporation of the united counties do pay the debt of the said counties for which the said town was jointly liable with the said counties, as forming part thereof at the time of contracting the said debt: that the counties had not paid, and were not liable to pay any sum whatever for the construction of roads or bridges within the said town; and that the corporation of Cobourg should pay £75, being the costs of the reference, and that the corporation of the united counties should forthwith pay the sum of £37 10s., to the town of Cobourg, being one-half thereof payable by the said united counties.

The clerk of the municipality of the united counties made affidavit that the original copy of the award was filed in the office of the clerk of the corporation of Cobourg, and that the copy produced to the court was obtained by the deponent from such clerk: that no copy of the award had been served upon him as clerk of the corporation of the united counties or otherwise, and that the first intimation received of it was by rumour: that he enquired of the clerk of the corporation of Cobourg, whether the arbitrators had filed with him, or placed in his office, any evidence taken by them under the reference, or any other papers on which the award was founded, and he informed deponent that no evidence was filed with him, and that he had no document whatever connected with the arbitration but the award: that he attended the arbitration on one occasion, and was asked questions, but was not examined on oath, and no minutes of evidence were taken down: that the arbitrators attended once or twice at his office, and examined the proceedings of the council of the united counties, but took no memorandum or extract of the proceedings that he saw: that they never applied to him for extracts or certified copies of proceedings of the councils: that so far as he was aware no evidence was taken by the arbitrators on oath: that the treasurer of the counties was, as he believed, examined before the arbitrators, but deponent was not aware that he was examined on oath: that no oath

or affirmation of said arbitrators was filed with him, nor with the award in the hands of the clerk of the corporation of Cobourg, as he believed.

The rule was enlarged until this term, when *Cameron*, Q. C., shewed cause. He filed an affidavit of Mr. Wallbridge, the third arbitrator, stating that all the arbitrators were sworn before entering upon the arbitration, and that the oaths were left in possession of Mr Scott, one of the arbitrators: (they were produced on the argument of this rule:) that the warden was duly notified of the time and place of meeting of the arbitrators, and attended at least one meeting: that the arbitrator, Mr. Vernon, had been or was then reeve of one of the townships of Northumberland, and was well informed of the debts of the corporation, and so was Mr. Scott, so much so that they did not require witnesses to tell them of them, but merely required to be informed of the precise figures, for the purpose of charging the amounts against the party to be charged therewith: that for that purpose all the arbitrators went as often as was necessary to the office of the treasurer of the county, and there saw either the treasurer, or his nephew, or the clerk of the counties, who turned to the books and shewed them such entries as they desired to see, and then wrote down the figures which they required, and that nothing else was required of him: that the clerk, Jellett, was not required as a witness, and was not a witness: that at the last meeting of the arbitrators the warden of the counties attended, and the arbitrators mentioned to him the sums on which they were to base their award, and that he did not and could not dispute the correctness of the same: that the arbitrators did not require other evidence than such as was within the knowledge of Vernon and Scott, all of which was verified by the books either of the county clerk or the treasurer: that a statement shewing how the award was arrived at was made up, which he believed was left with Mr. Scott, but which the latter had told him he, the deponent, took with him, which this deponent had no recollection of: that the statement was very simple and could be easily made up again: that in the opinion of the two arbitrators who made

the award, Cobourg had not received any thing from the united counties, and therefore the deponent could not agree to find any sum against the town : that the great sum constituting the joint debt of the counties and town had been expended in such a manner, deponent thought, as to injure the town, and the town could not be reasonably charged with any portion of the debt.

An affidavit was also filed by Mr. Scott, the arbitrator for Cobourg, to the effect that the arbitrators met frequently on the business referred to them : that on the last day the warden of the counties was with them nearly the whole day : that no witnesses were examined on oath, as no witnesses were required ; that all the necessary facts and data appeared in the treasurer's books and those of the clerk of the united counties, to which the arbitrators had free access, and which the warden and the mayor admitted to be correct, and no objection was made on either side : that Vernon refused to join in the award : that the papers on which the estimates for their award were made up were all in the hands of Mr. Wallbridge, who took them away before they signed the award, and from which he was to draw up a statement under the 13th sub-section of the 358th clause of the municipal act, if such statement was required, but he at the time was of opinion that that sub-section did not apply to this award, and therefore did not make it out at the time.

He then stated how they arrived at the sum to be paid for the town's share of the administration of justice for the next four years, and for the use of the gaol for that period, and to the town for its interest in the county gaol. These claims were not in question.

As to the £207 awarded to be paid to the town, they took the whole amount of moneys expended by the counties out of its funds for general county purposes for the last five years for the construction of roads and bridges without the town, in taking the same proportion that the town assessment bore to that of the whole counties, they arrived at the £207, which sum did not include the roads and bridges made with the moneys borrowed from the municipal loan fund.

As to their awarding that Cobourg should pay no part of the



existing county debt, the only such debt was the £115,000 borrowed from the municipal loan fund for making gravelled toll roads, and that money was so applied; but no part of such roads was within twelve miles of Cobourg, nor was the town in any way benefitted by said roads, but was injured by them, as they had the effect of turning the trade from Cobourg to other markets; and they considered that the interest which the town had in these toll roads, which were toll roads, was equal to its proportion of the debt incurred for making them, and so they awarded the town should pay none of the debt: that the counties never paid any money, nor were liable to pay any, for roads and bridges within the town: that the sum they awarded to be paid to themselves for their expenses was in his opinion reasonable, and they would not deliver their award till they were paid: that a great deal of time was necessarily expended in their investigations: that the chief point of difference, and the reason why Vernon would not join the award, was the view taken by the majority as to the existing debt of the county.

*R. A. Harrison* supported the rule, and cited *In re Marshall and Dresser*, 3 Q. B. 878; *Russell on Awards*, 64, 673; *Roberts v. Eberhardt*, 3 C. B. N. S. 482; *Richards v. Browne*, 9 Ir. C. L. Rep. 199; *Consol. Stats. U. C.*, ch. 54, secs. 26, 358; *Consol. Stats. U. C.*, ch. 83, secs. 4, 6, 69.

*McLEAN, J.*—The first sub-section of the 26th section of the act 22 Vic., ch. 99, provides, that after the final passing of the by-law to withdraw a town from the jurisdiction of a county in which it is situated, the amount which the town is to pay to the county for the expenses of the administration of justice and the use of the gaol, *as well as for the then existing debt of the county*, if not mutually agreed upon, shall be ascertained by arbitration under that act, and the agreement or award shall distinguish the amounts to be annually paid for the said expenses, *and for the then debt of the county, and the number of years the payments for the debt are to continue.*

Then the second sub-section of section 26, states matters to be considered in settling the several amounts to be paid under the award made in compliance with the previous sub-section. It declares that in *adjusting* their award the arbitrators shall, amongst other things, take into consideration the amount previously paid by the town, or which the town may be then liable to pay for the construction of roads or bridges by the county without the limits of the town, and also what the county may have paid or be liable to pay for the construction of roads or bridges within the town; and they shall also ascertain and allow to the town the value of its interest in all county property, except roads and bridges within the town.

The thirteenth sub-section of section 336 provides, that in case of any award under this act, which does not require adoption by the council, the arbitrator or arbitrators shall take, and immediately after the making of the award shall file with the *clerk of the council*, for the inspection of all parties interested, full notes of the oral evidence given on the reference, and also all documentary evidence, or a copy thereof; or in case they proceed partly on a view, or any knowledge or skill possessed by themselves, or by any of them, they shall also put in writing a statement thereof sufficiently full to allow the court to form a judgment of the weight which should be attached thereto.

The next sub-section provides that every award made under that act shall be in writing, under the hands of all or two of the arbitrators, and shall be subject to the jurisdiction of the superior courts of law or equity, and in the cases provided for by the last preceding sub-section the court *shall* consider not only the legality of the award, but the merits *as they appear* from the proceedings so filed as aforesaid, (that is, with the clerk of the council,) and may call for additional evidence, to be taken in any manner the court directs; and may, without taking such evidence, set aside the award, or remit the matters referred, or any of them, from time to time to the consideration and determination of the same arbitrators, or any other person or persons whom the court may appoint, as prescribed in the Common Law

Procedure Act, 1856, and fix the time within which such further or new award shall be made; or the court may itself increase or diminish the amount awarded, or otherwise modify the award, as the justice of the case may seem to require.

The arbitrators, as appears by the affidavits, have not taken down any notes of evidence given on the reference, nor have they put in writing a statement of their own knowledge in reference to the matters referred, nor have they filed any notes of evidence with the clerk of the council of either of the municipalities. In fact no oral or documentary evidence was taken, and it appears that the arbitrators proceeded on the knowledge which two of them, Scott and Vernon, had of the position in which the several municipalities stood towards each other in reference to money matters; and they only required to find out the specific sums on which to base their calculations, and these were found out by a reference to the treasurer's books in presence of the treasurer, or in presence of the county clerk.

When the legislature gave to the several superior courts power to consider not only the legality but the merits of such an award as this before us, they certainly intended that the evidence taken should be forthcoming, in order that any court applied to might be able to form a judgment of the weight which should be attached thereto. It is not forthcoming because there is none such, but it does not necessarily follow that the award must be set aside on that account.

There is no complaint against the award for any thing connected with money matters, except that it does not provide that the town shall pay some portion of the existing debt contracted for the purpose of constructing roads and bridges within the counties. Now it is shewn by affidavits, that in adjusting their award the arbitrators did take into their consideration the amount previously paid by the town, or which the town was liable for, for the construction of roads or bridges by the county without the limits of the town, and also what the county may have paid or be liable to pay for the construction of roads or bridges within the town. Having, then, in compliance with the statute, taken these matters into consideration, they have awarded



that the said united counties do forthwith pay to the said corporation of the town of Cobourg the sum of £207, which the said town has heretofore paid for the construction of roads and bridges by the said united counties without the limits of the said town, and they do further award that the said corporation of the said united counties do pay the debt of the said counties, for which the said town is jointly liable with the said counties, as forming part thereof at the time of contracting the said debt.

Of course the very object of taking into consideration how much money either of the municipalities had paid, or was liable for, expended in making roads or bridges within the limits of the other, must be that the sums so paid shall be adjusted, and the arbitrators have found a certain sum due to the town of Cobourg for money expended without the limits of that town by the county council; and finding that amount due, they award that the county council shall pay the existing debt contracted expressly for the construction of roads and bridges from which the town of Cobourg had received no advantage. The debt contracted for roads and bridges on the joint credit necessarily, as it appears to me, formed a subject of enquiry when adjusting the claims of the several municipalities for moneys of either expended in the limits of the other for roads and bridges. In awarding a specific sum to Cobourg, it appears to me that the remainder of the moneys expended for roads and bridges in the united counties is left to be borne by these counties after the separation of the town of Cobourg from them.

Then it appears by the 98th chapter of the acts of last session, 23 Vic., that the whole amount borrowed by the united counties of Northumberland and Durham from the consolidated municipal loan fund being \$460,000, or £115,000, being the whole existing debt of the counties, is declared to be payable by certain municipalities therein mentioned; and the proportion payable by each, and the mode of enforcing payment by the treasurer of the united counties, is particularly provided. The town of Cobourg is not one of the municipalities declared to be liable, and therefore is exempted by the operation of that act from the payment of any portion

of the money borrowed, and now constituting the existing debt of the united counties of Northumberland and Durham. If then the arbitrators had awarded a certain amount of that debt to be paid by the town of Cobourg, they would have awarded an amount which these counties were not entitled to receive.

Under these circumstances, I think the award satisfactorily disposes of the matters which were to be adjusted on the withdrawal of the town of Cobourg from the jurisdiction of the counties of Northumberland and Durham, and that the rule *nisi* to set aside the award must be discharged.

BURNS, J.—The first and fourth objections made against the award embrace the same subject matter. They are based upon the assumption that whenever a county or united counties is or are indebted at the time a town within the county limits withdraws, it necessarily follows that the town must pay a portion of the debt. It is very true the first subsection of 22 Vic., ch. 99, sec. 26, does speak of the amount which the town is to pay the county for the existing debt, without mentioning or saying whether the town should or not pay any part of the debt. We must construe the act of parliament reasonably unless the plain obvious sense appears upon the face of it. To construe that sub-section in the way the applicants here contend for, the award would have literally complied with it if the arbitrators had found that the town of Cobourg should pay one shilling or five pounds, or any other nominal sum, as the proportion of the debt, and that the united counties should pay the residue of it. If such an award as that had been made there would no doubt have been an application to set it aside on account of the fraudulent application of the powers of the arbitrators, and that it was a mere delusion so to exercise their powers. We see what the debt incurred by the united counties was for, and we find that the town of Cobourg derived no benefit whatever from the moneys borrowed by the united counties. No part of the moneys was expended within twelve miles of Cobourg.

The second sub-section gives power to the arbitrators, in

adjusting their award, to consider the amount which the town had previously paid for the construction of roads or bridges by the county, or which the town was then liable to pay, and also what the county may have paid or be liable to pay for the construction of roads and bridges within the town. This provision clearly must embrace the investigation whether any thing may be due from the one corporation to the other on account of those matters; and it would be absurd, if the arbitrators found nothing due on either side in respect of those matters to find that, yet the corporation of the town must under any circumstances pay to the county a portion of the debt. No doubt, so long as the town remained united to the county, it was not only liable to the persons with whom the debt was contracted, but also, as being a component part of the county, was liable *inter sese*. I do not think the legislature assumed or passed the act upon the assumption that such liability *inter sese* would compel the arbitrators to decide that at all events the town must pay a proportion of a debt contracted for moneys no part of which was expended within the limits of the town, and from the expenditure of which it appears from the affidavits the town not only has derived no benefit, but as it is said has sustained an injury. I see no objection to the award in this respect.

The second and third objections are that the arbitrators exceeded their authority in awarding that the united counties should refund the town the money which the town had paid for the construction of roads and bridges without the town limits, and not awarding that the town should pay the counties for the construction of roads and bridges within the town. It was only the debt then existing which the arbitrators had any power to deal with, and though the award might have been more explicit than it is with respect to the payment by the counties to the town, yet when we read the award with the act of parliament, it is, I think, clear enough what was intended. The award tells us that the arbitrators found the counties had expended nothing within the limits of the town, and, on the other hand, the town had paid towards the construction of roads and bridges in the county



the sum of £207. I think the arbitrators had power to compel repayment of the amount upon a separation of the two bodies, in order to adjust matters properly between them.

The fifth objection no doubt is entitled to prevail, so far as the clause respecting costs is concerned, for the statute is silent about costs. If the parties do not make an independent agreement about costs, the arbitrators acting under the statute have no jurisdiction over them.

The last objection complains that the arbitrators did not act upon sworn testimony, and therefore have conducted themselves irregularly and illegally. In reply to this the two arbitrators who joined in the award tell us that there was no necessity for any sworn evidence, for there was no dispute about any item; the whole information necessary or required was obtained from the arbitrator appointed by the counties, and from the books of account of the treasurer of the counties. The 13th sub-section of section 336, shews that the legislature contemplated such evidence being good evidence, and if it be good evidence, the only question remaining is whether it be sufficient. It is not suggested on the part of the complainants that it was insufficient; they only complain that it was not taken on oath. There surely was no occasion to prove the correctness of the information derived from the reeve of one of the townships of the united counties, who was the arbitrator on their part, and such as was derived from their own books, when, on the other hand, on the part of the town all that was admitted to be correct.

ROBINSON, C. J., concurred.

Rule absolute to set aside that portion  
of the award relating to costs, and  
discharged as to the rest.

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# HIGGINS ET AL. V. THE CORPORATION OF THE TOWN OF WHITBY.

*Action against municipality as shareholders in R. W. Co.—Stock payable by debentures—14 & 15 Vic., ch. 51, secs. 18, 19—Pleading.*

To declaration under 14 & 15 Vic., ch. 57, sec. 19, by judgment creditors of a railway company against a municipality as shareholders, defendants pleaded, in substance, that they subscribed for the stock under a by-law, which provided that their debentures, payable in 1877, should be issued for the sum subscribed as the same should become payable, and that the company should take such debentures at par; and that the plaintiff knew this before he became a creditor.

*Held*, on demurrer, a good defence.

The 19th clause of the statute does not apply in the case of a subscription under the 18th, unless such subscription is made in the ordinary manner.

This was an action brought under 14 & 15 Vic., ch. 51, sec. 19, against defendants as shareholders of 2000 shares in the Port Whitby and Lake Huron Railway Company, setting out a judgment recovered by the plaintiffs against the company for £90 4s. 10d., the issuing of execution thereon against the company, a return of *nulla bona*, and that defendants were owners of 2000 shares, on which an amount was unpaid exceeding the plaintiff's claim.

*Plea*.—That the defendants subscribed for the said stock in the said railway company under and by virtue of a by-law of the corporation of the town of Whitby, passed on the 21st of September, 1857, intituled, "A by-law to authorise the municipality of the town of Whitby to take shares in the capital stock of the Port Whitby and Lake Huron Railway Company," by which by-law it was and is provided, among other things, that the said defendants should immediately after the passing thereof, subscribe for two thousand shares in the capital stock of the said railway company, to the extent of £50,000, absolutely, and should also subscribe for one thousand shares in the said stock of the said company to the extent of £25,000, conditionally, to be paid on the 21st of September, 1861, if the said railway should be completed by that day from Port Whitby, northerly, to Beaverton, and upon the condition that the said £25,000 should be expended only in the construction of the said line from Beaverton, northerly, to the terminus on Lake Huron: that debentures of the municipality should be issued for the

said sums of £50,000 and £25,000, when and as the said several amounts of stock should respectively become payable: that the debentures to be issued under the said by-law should be payable on the 19th of September, 1877; and the said Port Whitby and Lake Huron Railway Company should take the debentures to be issued by the defendants in payment of the stock subscribed by them at par; and that not more than one-tenth of the said debentures for the £50,000 should be issued until the company had obtained subscriptions of stock to the extent of £100,000, exclusive of the stock to be subscribed by defendants. And the defendants aver that the stock mentioned in the declaration is the stock mentioned in said by-law, and that the same was subscribed for upon the express condition that the defendants' debentures should be taken in payment thereof; and the defendants further say they never became otherwise liable to pay for the said stock than by debentures: that no calls have been made on said stock by the said company, and the defendants have never become liable by reason thereof to pay to the said company any money or debentures for or on account of the said stock so subscribed by them as aforesaid; and that the said plaintiffs are ratepayers and corporators of the said corporation of the town of Whitby, and had notice, before the contracting of the debt in the said judgment mentioned, of all and singular the premises.

*Demurrer*, that the plea admits that the defendants subscribed absolutely for two thousand shares of stock in the railway company mentioned in the declaration, and that defendants are shareholders in said company: that it is immaterial as regards the rights of the plaintiffs, who are creditors of said company, what may have been the agreement between the company and defendants as to the mode of payment of the stock, inasmuch as being stockholders they are liable for the amount of the plaintiffs' claim. That it is immaterial whether calls have been made on said stock or not, as regards the plaintiffs' claim, the defendants' said plea not denying that there is an amount unpaid on the defendants' stock equalling the plaintiffs' claim; that the said plea does not show that the defendants ever offered to pay for said stock,



or to pay the plaintiffs' claim in the debentures of the defendants.

*Richards* Q. C., for the demurrer, cited 16 Vic., ch. 105, secs. 2, 7; 14 & 15 Vic., ch. 51, secs. 18, 19; Consol. Stats. C., ch. 66, sec. 80; *Henderson v. The Royal British Bank*, 7 E. & B. 356; *Powis v. Harding*, 1 C. B. N. S. 533; *Daniell v. The Royal British Bank*, 1 H. & N. 681.

*M. C. Cameron*, contra.

ROBINSON, C. J., delivered the judgment of the court.

The plea is in our opinion a good defence. The statute 14 & 15 Vic., ch. 61, sec. 18, authorised the municipality to subscribe stock, and to issue their debentures, for the amount which they might engage to pay; and taking the whole clause together, it is clear that in order to guard the public interest, and to avoid an inconvenient pressure upon the public funds, they were first to provide by by-law, with the consent of the electors first obtained, for subscribing the stock, and incurring any other liability which they were authorised to incur under this 18th clause. That enactment gave power to the defendants to subscribe under the conditions, which it is stated were specified in the by-law: namely, that the railway should accept the debentures of the municipality for the stock, to be payable in the year 1877; and the plea avers that the stock was so subscribed to be paid for to the company in debentures, and that the plaintiff knew this before he became a creditor of the company.

This action is an attempt to make the municipality liable like ordinary stockholders who were compellable to pay in money when called upon. The debt sued for is small, and might put the municipality to no inconvenience, but on the same principle on which this action could be sustained, the municipality might be made liable to any amount of debts contracted by the company, although that would be contrary to the undertaking which they entered into, under sanction of the statute. The 19th clause of the 14 & 15 Vic., ch. 51, under which the plaintiff brings his action, does not apply, we think, in this case, of a subscription under the 18th

clause, although if the municipality had subscribed in the ordinary manner it might have applied.

Judgment for defendants on demurrer. (a)

### MCDougall v. Elliott.

*Sale of goods—Quantity not ascertained—Property held not to pass.*

B. transferred to one S. 100 tons of coal, as security for an endorsement. He had then a certain lot of coal lying on a wharf, supposed to contain that quantity, though in reality only 78 tons, and subject to a claim for wharfage equal to the value of ten tons, but the jury found that the transfer was not confined to this lot, but was of 100 tons, B. having more in his yard. No other coal, however, was set apart, and it had not been ascertained how much would be required to make up the difference, when B. assigned all his effects, including the coal in his yard, to the plaintiff, for the benefit of creditors. Defendant afterwards removed from the yard 42 tons, being 22 to make up the deficiency in quantity, 10 for the wharfage, and 10 because the quality of that in the yard was inferior to that on the wharf, but he afterwards abandoned his claim to the last 10 tons.

*Held*, that the plaintiff was entitled to recover, for the sale to S. did not pass the property in any of the coals in the yard.

The declaration contained a count in trover, and a count in trespass for forty-six tons of coal.

*Pleas*.—1. Not guilty. 2. That the goods were not the plaintiff's. 3. Leave and license.

The trial took place at the last assizes for Cobourg, before *Burns, J.*, and the facts of the case appeared as follow:—one William Butler, on the 8th of December, 1857, made an assignment of his estate and effects to the plaintiff for the

(a) The plaintiffs, besides demurring to the plea, took issue upon it, and at the trial, before *Burns, J.*, at Whitby, the stock book was produced, and it was found that the mayor of Whitby, under the corporate seal, subscribed for 2000 shares, and 1000 shares, on the 6th of November, 1857. The by-law was also proved, and a petition of the town council to the legislature, dated the 6th of April, 1858. At the foot of the subscription for the shares contained in the stock book, a memorandum appeared in these words:

"The above subscriptions of two thousand and one thousand shares, respectively, being subject to the conditions and provisions of by-law No. 40 of the municipality of the town of Whitby, hereunto attached."

The president of the railway company proved that although the company was organised by a board of directors, and the subscriptions of stock exceeded the £100,000, yet the directors had never made any calls upon the stock. He proved also that the company had contracted debts, and among others the debt due to the plaintiffs.

A verdict was taken for the plaintiffs for £101 13s. 10d., and leave reserved to the defendants to move to enter a verdict for them.

A rule *nisi* having been obtained for this purpose, was afterwards made absolute, in accordance with the judgment given on the demurrer.

benefit of creditors. Among other things assigned was a quantity of coal, in a coal yard near the wharf at Cobourg. Before that assignment was made Butler was possessed of a quantity of coal lying upon the wharf at Cobourg, of a better quality than that in the yard. The quantity lying on the wharf was supposed to be 100 tons, but it turned out afterwards that it was but 78 tons. Previously to the assignment for the benefit of creditors, Butler, as he swore, transferred the coals on the wharf to one Sutherland, to secure him for endorsing a note for him, but he said he did not sell or transfer any of the coals in the yard to Sutherland. Sutherland swore that Butler did not confine his sale or bill of parcels to the coal on the wharf, but sold him 100 tons of coal, and he was to have 100 tons. Sutherland afterwards sold the 100 tons to the defendant. The defendant, in 1857, was Harbour Master, and for the coals on the wharf there was due 25 cents per ton, but nothing was said about this at the time of the sale, either by Butler to Sutherland, or Sutherland to the defendant. The defendant, about the 28th of December, 1857, removed his coal from the wharf, and then found there was only 78 tons. Of this he claimed 10 tons for the wharfage dues, thus reducing the coals on the wharf to 68 tons. Then, to make up 100 tons, he removed the residue from the yard, from the whole quantity there piled up, without asking any one whether he might do so. As these coals in the yard were of an inferior quality to those on the wharf, the defendant took ten tons more than the number he was entitled to, even supposing he had a right to take them.

The contest between the parties was whether the sale by Butler to Sutherland was confined to the coals upon the wharf, or whether Sutherland was to have 100 tons, in which latter case the defendant's counsel contended that the defendant had a right to separate as much coal from the coal in the yard as was sufficient to make up the number of 100 tons. He conceded that the defendant had no right to take the additional ten tons on account of the difference of quality, and as to the ten tons due for wharfage, he argued that it was a question for the jury.



For the purpose of determining the question, the learned judge left it to the jury whether the sale was confined to the coals upon the wharf or not. He intimated that in his opinion it did not make much matter which way the question was determined, as in all probability it would be found the plaintiff was entitled to recover for all the coals taken from the yard.

The jury found that Butler sold to Sutherland 100 tons, and he was entitled to that quantity, and that the sale was not confined to the coals on the wharf.

With regard to the ten tons taken for wharfage dues, and ten tons additional taken to make up value, the learned judge told the jury the plaintiff was entitled to recover for both. The jury, however, found for the plaintiff for ten tons only, at \$5 per ton, the price agreed upon between the parties.

Upon this finding a verdict was entered for the plaintiff for £12 10s., and leave was reserved to the plaintiff to move to increase the verdict by adding to it £27 10s., the price of the 22 tons.

Galt, Q. C., obtained a rule *nisi* for that purpose.

Cameron, Q. C., shewed cause, and cited Aldridge v. Johnson, 7 E. & B. 785.

ROBINSON, C. J., delivered the judgment of the court.

The question is whether the plaintiff was entitled to recover, in addition to what he did recover, the value of 22 tons of coal taken by the defendant from the coal yard, which value it was agreed by both parties should be taken to be after the rate of \$5 a ton. It cannot be held that the property in any of the coals in the yard had passed by the alleged sale from Butler to Sutherland, of such quantity as might be necessary for making up the lot that was on the wharf to 100 tons. It had never yet been ascertained how many would be required to be got from the yard to make up the 100 tons, and until the requisite quantity had been ascertained, and such quantity separated from the rest by Butler, and set apart for Sutherland, the property in all the coals that were in the yard remained in Butler. They were

all his, then, when he made his assignment to the plaintiff for the benefit of his creditors.

That being so, the defendant, when he took 32 tons from the yard to make up the 68 tons that were on the wharf to 100, took so many tons of coal that had become the property of the plaintiff, under the assignment made to him; and the plaintiff, being entitled to recover for the whole, has a right to have the price of 22 tons (or \$110) added to the \$50, which the jury gave him for the ten tons taken by the defendant, with less pretence of right, perhaps, than the other 22 tons, but in fact with no plainer violation of the plaintiff's legal right; for when Butler assigned the coals in the yard to the plaintiff, they were in fact all his; and if he did really sell to Sutherland 100 tons, which he has never delivered in full Sutherland has his remedy against him for non-fulfilment of his agreement, if it is worth his while to pursue it.

Rule absolute for adding £27 10s.  
to the verdict for the plaintiff.

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### THE SCHOOL TRUSTEES OF THE CITY OF TORONTO V. THE CORPORATION OF THE CITY OF TORONTO.

*Rate for school purposes—Mandamus—Consol. Stats. U. C., ch. 64, sec. 79<sup>1</sup>*

A mandamus was granted to compel a city council to levy the sum required for school purposes for the year, according to the estimate furnished to them by the school trustees.

It appeared in this case that the corporation having received the estimate did not object to it, but passed a by-law to provide the sum required, which they afterwards repealed, and substituted another, imposing a smaller and insufficient rate; and no reason was given for refusing to provide the sum called for.

*Cameron, Q. C.*, obtained a rule in this term, calling on the Corporation of the City of Toronto to shew cause why a peremptory mandamus should not issue, commanding them to assess and levy \$30,000 ordered by the board of school trustees of this city to meet the expenditure of the common schools of the said city for 1860, according to the estimate furnished by the board to the municipal corporation, by levying such a rate upon the rateable property in the said city as should be sufficient to raise the said sum of \$30,000.

This rule was obtained upon an affidavit made by one of the school trustees, that the annual value of the whole rateable property in the city for the current year, (1860,) as finally settled by the court of revision, was \$1,643,888: that the school trustees adopted the sum of \$30,000 as the expenditure required for the common schools for 1860: that an estimate was accordingly furnished by the trustees to the corporation of the city, and that the city council had passed a by-law to assess and levy one cent and six mills in the dollar on the above-named value for such common school expenditure, and no more, but that such rate was not sufficient to raise \$30,000, but it would require a rate of two cents in the dollar.

The city council did pass a by-law, which would have imposed a larger rate for school purposes, the particulars of which by-law were not shewn, but afterwards, on the 24th of October, 1860, they repealed that by-law, which had fixed the rate for the year, and which appropriated the proceeds of it to various purposes, including school purposes, and they passed another by-law as a substitute for the first; and in this latter by-law, they provided that of the proceeds of a rate of fifteen cents in the dollar imposed for all purposes mentioned in the by-law, the proportion of one cent and six mills should be applied to defray part of "the expense of common school education."

No affidavits were filed in answer to the rule. It was sworn that the city council had been called upon by the school trustees to impose the necessary rate of two cents in the dollar upon the whole value of rateable property, and had declined to do so.

*Adam Wilson*, Q. C., shewed cause, and contended that the school trustees had no right to insist that the city should impose a rate for school purposes, because they might have the means in their hands of defraying the expense, or part of it, without such rate, or they might choose to raise the same by a loan. He objected, further, that as the school act enabled the school trustees to raise the money themselves by rate, they were not in want of the extraordinary remedy



by mandamus, and on legal principles had therefore no right to it.

He cited The School Trustees of Brockville and the Town Council of Brockville, 9 U. C. R. 302; School Trustees of Port Hope and the Town Council of Port Hope, 4 C. P. 418; The School Trustees of Galt and The Municipality of Galt, 13 U. C. R. 511; Ex parte The Overseers of Downton, 8 E. & B. 856; The Queen v. The Bristol Dock Co., 2 Q. B. 64; Rex v. Proprietors of Margate Harbour, 2 Chy. Rep. 256; The King v. The Severn and Wye Railway Co., 2 B. & Al. 646; The King v. The Bristol Dock Co., 6 B. & C. 181; The South Eastern Railway Co. v. The Queen, 17 Q. B. 485; Consol. Stats. U. C., ch. 64, sec. 79, sub-sec. 11, 13, 18.

ROBINSON, C. J., delivered the judgment of the court.

In the case cited, of The Brockville School Trustees v. The Town Council of Brockville, (9 U. C. R. 302,) this court had granted a mandamus *nisi*, to which a return was made, and that return brought up a particular question, whether the trustees had or had not proceeded irregularly in an important step which they had taken, in substituting one general school for four local schools, and incurring, without reference to the ratepayers, a large expense in erecting the new school. The town council rested their opposition to raising the money by rate on the ground that that measure of the trustees was illegal. This was an important question, which both parties desired should be determined by the court, and it was raised in that formal manner on the return to the mandamus. The court were bound to give judgment on the sufficiency of the return made by the town council, and finding it to be insufficient they decided accordingly, and the writ was ordered. The ground taken here, that the school trustees had power by law to raise the rate themselves, and therefore could not call upon the court to command the council, does not seem to have been taken, and it is not likely that it would be, because the objection went to the right to raise the rate either by the one means or the other, on account of the alleged illegality of the ex-

penditure in putting up the new school house. That case therefore cannot be relied upon as an authority for maintaining that the trustees can as a matter of right insist in all cases on the municipality raising the money by rate.

Then looking at the two cases of *The School Trustees of Port Hope*, and *The Town Council of Port Hope*, (4 C. P. 418,) and *The School Trustees of Galt* and *The Municipality of Galt*, (13 U. C. R. 511,) and looking at the existing school act, Consol. Stats. U. C., ch. 64, we think it results from the whole that the court may, if it shall seem to them to be manifestly proper in any case on the facts before them, order the municipality of a city to raise a rate, notwithstanding the school trustees might under the act impose and collect the necessary rate themselves.

We take this case to come expressly under the 79th section of ch. 64. Here the school trustees have laid before the council their estimate of the sum required for the year for school purposes, whereupon the statute says, p. 747, sec. 11, (f,) "And the council of the city, town, or village, *shall* provide such sums, *in the manner desired* by the said board of school trustees." We are not sure what may be meant by the words "in the manner desired." It can hardly mean that they are to determine for the council whether the money shall be paid out of existing city funds, that may be on hand, or borrowed on debentures, or raised by rate, and if by rate the manner of levying it. It means rather, we suppose, that the city council are to take care and provide it at such periods and in such sums as it may be called for.

The sub-section 12 of this clause is all that we find in the existing school act which gives power to the board of school trustees in a city to levy school rates, and that seems to be a mere discretionary power that may be exercised in aid of the power of the city to collect school moneys; and when the trustees levy money under that provision it would not be on rate-payers generally, but on the parents or guardians of the children attending any school under their charge. These at least are not co-extensive powers.

It is very reasonable for the city council to say that the trustees cannot dictate to them, neither should the court or-

der, by what means they are to provide the money, whether by rate or loan, and in the case from Port Hope, (13 U. C. R. 511,) that objection was considered by the court to have much force.

But on all that is before us in this case, we see—1st. That the city council have received the usual estimate for the year, and have not objected to it.

2nd. That they proceeded to provide by by-law for raising the whole sum by rate.

3rd. That they afterwards in effect cancelled what they had done, so far that they have provided a less rate, which will only produce a part of the sum, and will leave the rest unprovided for.

4th. That having every opportunity of shewing what their reason was for doing this they have given no reason, but leave to their full force the grounds of complaint which the trustees have laid before us.

If they substituted a rate of one dollar and six mills for a rate of two dollars, because that would produce the sum required, or because they have paid, or are ready to pay, or mean to provide the residue by loan, or from their current general purpose funds, or for any other good reason, we may take it for granted they would have laid their reasons before us by affidavits. Not having done so, we are bound, we think, to proceed upon the assumption that they have no good reason to offer.

The interests of the common schools are too important in a large city to admit of a sudden suspension of their proceedings, from any dispute of this kind between the two authorities, if it can possibly be avoided. It would produce the utmost inconvenience.

We think we must make the rule absolute, for the obligation upon the city council under the statute is express in its terms, and no good reason has been shewn why, since it has been executed in part, it has not been executed to the full extent.

The cases cited from 2 B. & Al. 646, and 6 B. & C. 181, are satisfactory authorities for the purpose for which they were cited, but do not apply under the circumstances of this



case to restrain us from doing what we can to prevent what, for all that appears, might come to be a great public evil.

If the city corporation shall hereafter shew that they have rendered it unnecessary to levy a rate as required by providing the money without delay, either wholly or in part, from other sources, they may be assured, that no fault will be found with such a course.

It is but just towards the city to suppose that if they were prepared to meet the estimate without levying a rate, they would not have left it to this time unpaid, or at least such amounts on account as were from time to time required.

Rule absolute.

# FAHNESTOCK ET AL. V. PALMER.

*Promissory notes—Exchange on New York—Guarantee.*

In an action on instruments promising to pay money, "with exchange on New York," *McLean*, J., concurred in the decision of the Common Pleas in *Palmer v. Fahnestock*, 9 C. P. 172, that they were not promissory notes. *Robinson*, C. J., and *Burns*, J., expressed no opinion on the point, the plaintiffs not having declared upon them as notes.

The defendant endorsed notes in the above form for the accommodation of the maker, who was in business as a druggist, without knowing how they were to be applied, and the maker transferred them to the plaintiffs for goods purchased from them. Defendant not being liable upon them as notes:

*Held*, that there was clearly no right of action against him as upon a guarantee.

The following special case was submitted for the opinion of the court.

## CASE.

E. W. Palmer, carrying on business in Kingston as a druggist, was in the habit of purchasing goods from Fahnestock, Hull & Co., of New York, (the plaintiffs in this action,) and from other parties, on credit and also for cash.

On the 19th of June, 1857, said E. W. Palmer was indebted to the plaintiffs for goods sold to him in the sum of £67 2s., and to secure the payment of said sum he gave the annexed instrument marked A., purporting to be a promissory note at six months, endorsed by one J. C. Crookshank, then a partner of said E. W. Palmer, and by the defendant.

On the 5th of July, 1857, said E. W. Palmer was indebted to said plaintiffs in the further sum of £50 17s. 6d., and to

secure the payment thereof gave a second instrument hereto annexed, marked B., purporting to be a promissory note at six months, endorsed by the defendant.

On the 14th of September, 1857, said E. W. Palmer was further indebted to said plaintiffs in the sum of £72 17s., and to secure the payment thereof gave a third instrument, hereto annexed, marked G., endorsed by said Crookshank and the defendant.

Subsequently the said E. W. Palmer failed in business, and is since dead.

The defendant, who has always resided in Kingston, endorsed for the accommodation of said E. W. Palmer, the instruments annexed, marked A., B., C., which said instruments said E. W. Palmer, without any specific knowledge on the part of the defendant as to how they were to be applied, transferred to these plaintiffs, without any privity between them and defendant.

If the court are of opinion that the defendant, Noble Palmer, is liable as endorser on said instruments, or that the endorsement of said defendant amounts to a guarantee, or that the plaintiffs are, under the circumstances, entitled to write above the signature of the defendant on said instrument a guarantee in the following or similar words:—"In consideration of the time given to E. W. Palmer for the payment of the within sum, I hereby guarantee the payment thereof," it is agreed that judgment shall go for the plaintiff for £212 11s. 8d, with interest, and costs. But if the court are of opinion that under no circumstances is the defendant liable on his endorsement, then that judgment shall go for the defendant with costs.

The following are the instruments above referred to :

[ A. ]

£67 2s 0d., & ex. currency.

KINGSTON, 19th June, 1857.

Three months after date, for value received, I promise to pay Jno. C. Crookshank, or order, at the Bank of British North America, in Kingston, the sum of sixty-seven pounds two shillings, with exchange on New York.

(Signed) E. W. PALMER.

[ B. ]

£50 17s. 6d., currency.

KINGSTON, July 5th, 1857.

Six months after date, for value received, I promise to pay N. Palmer or order, at the Bank of British North

America, in Kingston, the sum of fifty pounds seventeen shillings and sixpence, with exchange on New York.

(Signed) E. W. PALMER.

[ C. ]

£72 17s. 0d., currency. KINGSTON, Sept. 14th, 1857.

Six months after date, for value received, I promise to pay J. C. Crookshank, or order, at the Bank of British North America, in Kingston, the sum of seventy-two pounds seventeen shillings, with exchange on New York.

(Signed) E. W. PALMER.

*Prince*, for the plaintiffs, cited *Pollard v. Herries*, 3 B. & P. 335; *Chy. on Bills*, 439; *Gibbs v. Fremont*, 9 Ex. 31; *Mellish v. Simeon*, 2 H. Bl. 378; *Francis v. Rucker*, Amb. 672; *De Tastet v. Baring*, 2 Camp. 65; 12 Vic., ch. 76, sec. 3.

*Richards*, Q. C., contra, cited *Story on P. N.*, sec. 20; *Palmer v. Fahnestock*, 9 C. P. 192; *Story on Bills*, secs. 42, 158; *Byles on Bills*, 78, 79; *Chitty on Bills*, 85-6; *Smith v. Nightingale*, 2 Stark. 375; *Bolton v. Dugdale*, 4 B. & Ad. 619; *Ayrey v. Fearnside*, 4 M. & W. 168; *Barlow v. Broadhurst*, 4 Moore, 471; *Follett v. Moore*, 4 Ex. 410; *Gibb v. Morisette*, 4 U. C. R. 205; *Lock et al. v. Reid et al.*, 6 O. S. 295; *Stead v. Liddard*, 1 Bing. 196; *Bell v. Welch*, 9 C. B. 154; *Palmer v. Fahnestock*, 9 C. P. 172.

ROBINSON, C. J.—In this case a verdict has been rendered for the plaintiffs for £212 11s. 8d., subject to the opinion of the court, and we are requested to determine, 1st, whether the instruments, which are not set out in the case, as they were intended to be, but of which copies have been supplied to us, can be held to be promissory notes. This turns wholly upon the question whether the words in the notes “with exchange on New York,” prevent their being treated as promissory notes, on account of their effect in rendering the sum payable uncertain, exchange on New York not being at any rate fixed and certain, but fluctuating according to the circumstances of the time and their influence on exchange.



2ndly. If the plaintiffs cannot recover upon them as promissory notes, then whether they can recover upon them as upon guarantees given by the defendant, the endorser, in the manner suggested in this case.

The first point can hardly be said to come properly before us, since the record upon which the verdict for the plaintiff was taken by consent, contains no counts against the defendant as endorser of promissory notes, (a) and therefore there could be no recovery of that kind upon the record as it now stands.

In a case between these same parties, upon another writing of the same kind, the question whether the writing was a promissory note, notwithstanding the money was made payable "with exchange on New York," came for decision before the Common Pleas, on appeal from a judgment of a county court upon demurrer.

We should hardly go into the consideration of that judgment with any idea of overruling it, in a case which really does not present the same question.

If this record had contained counts upon promissory notes, we should probably have conformed to the judgment given in the Common Pleas, and then the plaintiffs, if they chose, might have carried the case farther by appeal.

In practice, I apprehend, notes payable "with exchange" on a foreign country are very frequently made and negotiated, and even sued and recovered upon, without any objection being taken, so that it may be desirable that the point should be finally settled in appeal, if the correctness of the judgment given in the Common Pleas between these same parties is doubted.

Upon the other point, whether this defendant, of whom all that is stated is that he endorsed the several papers produced, could be held liable as upon a written guarantee to pay the plaintiffs for the goods furnished to the maker, E. W. Palmer, and his partner, I have no doubt that he could not be held so liable. I mean that the plaintiffs could not make him so liable by any thing which they could be held entitled to

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(a) The declaration was framed as upon a guarantee.

write above the defendant's signature, which stands on the back of each paper. The plaintiffs' counsel seems to be himself satisfied that the plaintiffs' action in that shape cannot be supported. It is admitted that the defendant knew nothing of the transactions between the maker of the note and the plaintiff, or of the use that was made of the paper which he endorsed: that he merely gave his name as endorser of what no doubt he supposed to be promissory notes; and that there was no privity whatever between him and the plaintiff.

McLEAN, J.—I am of opinion that judgment must be given for the defendant, for the instruments endorsed by him are not strictly promissory notes, not being for the payment of a sum certain, the exchange promised to be paid with the sum specified being of uncertain amount, varying according to the circumstances of trade, or the extent of dealings in money transactions or otherwise between Kingston and New York.

Then the endorsement cannot be considered as a guaranty. The defendant did not make it as such, and he cannot be held liable without recourse to parties who would be responsible to him on the instrument if it were a promissory note. If an undertaking could be written over his signature which would render him liable for the amount specified in the instrument, it would be giving to his undertaking as an endorser an effect never contemplated by any of the parties. As endorser he might be discharged from liability from want of notice, but if such guaranty could be written over his signature he would be rendered liable whether he received notice or not, and the plaintiff would in fact be in a better position than if the instruments were, as they were intended to be, promissory notes. If such an endorsement could be written over the defendant's name, it might with equal propriety be written over the name of the prior endorser on the instrument, and then the plaintiffs might have their remedy against either in distinct actions, and have recourse on the estate of E. W. Palmer also, without leaving to the defendant any recourse against the prior endorser, or against

any body unless against an insolvent estate. The circumstance of there being no remedy at law upon the several instruments as promissory notes cannot justify their being converted into or considered as contracts of a totally different character.

BURNS, J., concurred in the judgment, but expressed no opinion as to whether the instruments could be considered promissory notes,

Judgment for defendant,

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The following gentlemen were called to the bar during this term :—JEHIEL MANN, SAMUEL GEORGE WOOD, THE HONORABLE LEWIS THOMAS DRUMMOND, JOHN BAN MACLENNAN.

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HILARY TERM, 24 VICTORIA, 1861.

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*Present:*

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD McLEAN, J.

“ ROBERT EASTON BURNS, J.

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KETCHUM V. SMITH ET AL.

*Deed—Receipt for purchase money—Effect of—Pleading.*

To an action on the common count for land sold and conveyed, defendant pleaded never indebted and payment, and at the trial he produced the conveyance to him, in which the receipt of the purchase money was acknowledged.

*Held*, conclusive evidence under the plea of payment, and that it was unnecessary to plead the estoppel specially.

APPEAL from the county court of Lambton.

Action on the common counts, for money payable by defendant to plaintiff for a steam saw-mill, steam engine and boiler, with the gearing, machinery, and appurtenances thereof, sold and delivered by the plaintiff to the defendants at their request, and for a messuage and lands sold and conveyed by the plaintiff to defendants at their request.

*Pleas*, never indebted, payment, and set-off.

At the trial the plaintiff's counsel called upon defendants to produce a certain deed of bargain and sale, under a notice to produce. It was produced, and he admitted that the lands contained in it were those referred to in the declaration, and that the action was brought to recover a portion of the purchase money mentioned in said deed.

The deed was a conveyance of certain land by the plaintiff to defendants in fee simple, the consideration being thus expressed, “for and in consideration of fifteen

hundred dollars of lawful money of Canada, to me by the said parties of the second part in hand well and truly paid, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged."

Defendants' counsel objected that the receipt under seal contained in the deed being conclusive the action could not be maintained, and thereupon the plaintiff was nonsuited.

This nonsuit was afterwards set aside, upon the ground that the estoppel by the receipt not having been pleaded, could not be relied upon as conclusive, and that the receipt therefore should have been left to the jury with other evidence as to the fact of payment.

From this judgment the defendants appealed.

*Davis*, for the appellants, cited *Baker v. Dewey*, 1 B. & C. 704; *Rowntree v. Jacob*, 2 Taunt 141; *Lampon v. Corke*, 5 B. & Al. 606; *Sug. V. & P.*, vol. iii., p. 193, note; *Tay. Ev.*, sec. 83.

*Richards*, Q. C., contra, cited *Lord Feversham v. Emerson*, 11 Ex. 391; *Wilson v. Butter*, 4 Bing. N. C. 756; *Carpenter v. Buller*, 8 M. & W. 212; *Young v. Raincock*, 7 C. B. 310; *Littlechild v. Banks*, 7 Q. B. 739; *Smith v. Winter*, 12 C. B. 487.

ROBINSON, C. J., delivered the judgment of the court.

Knowing, as we must know, how frequently it happens in this country that the purchase money for land conveyed, or a great part of it, is allowed by agreement of the parties, sometimes verbal, to stand out upon credit, while in the body of the deed the grantor expressly acknowledges that the whole price was paid to him at or before the time of executing the indenture, it cannot but be with reluctance that we feel ourselves compelled in any case to hold the receipt in the body of the deed to be conclusive evidence of payment. But that the law is so has been long held in England, and it is right to consider that when the fact is that the price has been paid, as the language of the deed imports, the purchaser can do nothing which ought more effectually to protect him against any action for the money

than to have the receipt formally acknowledged under the seal of the grantor. It is true that in most cases there are added in the deed words of release as well as an acknowledgment of payment, and in this deed there are no such words of release; but we take that to signify nothing, for if the acknowledgment of payment is conclusive it can be of no consequence that the vendor has not released the party from the debt which must be taken to have been paid.

The cases which may be cited for establishing that the receipt *in the deed* is conclusive, are Rowntree v. Jacob, 2 Taunt. 141; Baker v. Dewey, 1 B. & C. 704; Lampon v. Corke, 5 B. & Al. 606. We refer also to Sug. V. & P., vol. iii., p. 193, note, 10th ed., and to Taylor on Evidence, sec. 83.

Then if we must take the law to be so settled, as we think we must, whatever remedy may be in the power of the party in equity, where there has not been any separate security taken for the purchase money, we are to consider whether in this case it was rightly held in the court below that the receipt in the deed could not be allowed to avail the party on the principal of estoppel, because there was no plea setting up an estoppel, but that it must go on the other evidence to the jury as a question of fact, whether the price for the land had been actually paid or not.

We confess ourselves unable to see how it can be denied that if the receipt in the deed is conclusive evidence of payment it must be received as such either on the plea of never indebted or of payment; we mean, of course, in the absence of evidence of fraud in obtaining the seal of the plaintiff to the deed containing the receipt.

If the money has been paid it must have been paid before the deed was made or at the time. If before, that is, in advance, which it might be, then there never was a debt; and we think it would be equally correct to say that there never was a debt for the land sold and conveyed if it was paid for at the time; but even if it could be held, as it has been intimated by a very learned judge it should be, that there has been in fact a debt when the land or goods were paid for at the moment they were bought, then surely under



the plea of payment the deed must be conclusive evidence where no fraud has been practised.

We think the judgment given in the county court must be reversed, and that the rule *nisi* for setting aside the nonsuit and granting a new trial must be discharged.

Appeal allowed.

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### DUGGAN V. KITSON.

*Division court execution—Sale of chattels real—Consol. Stats. U. C., ch. 19.*

A term for years in land cannot be sold under an execution from the division court, but only such things as can be delivered over to the purchaser, or such securities as the Consol. Stats. U. C., ch. 19, sec. 151, expressly authorises the seizure of.

EJECTMENT for lot 20 on the south side of King street, in the city of Toronto.

At the trial, at Toronto, before *Hagarty*, J., it appeared that the defendant had become tenant to the plaintiff of the premises in question, under a lease made to him by the plaintiff on the 27th of February, 1858, to hold for five years, at a rent of £100, to be paid quarterly. There were six houses, of an inferior description, upon the property leased. While defendant was in possession as tenant, on the 9th of February, 1860, a division court execution, which issued on that day at the suit of Dempsey and Blevins against this defendant, came to one Severs, a bailiff, under which he advertised and sold this lease. The sale took place on the 31st of March, 1860, by public auction, by a person employed by Severs, and the lease or term was bid off by the plaintiff, the landlord, for £3 15s., and a bill of sale was executed of the term to him by Severs, the bailiff.

The bailiff, Severs, swore that there were no moveable goods of the defendant liable to be seized so far as he knew, but he admitted that he did not go to see whether there were any such goods or not. He swore that neither the plaintiff nor any one else had told him to seize this lease, but he had before seized it on another division court execution at the suit of one Orr, which was afterwards stayed by order of the judge, and then, when Dempsey's writ came to him after-

wards, he seized and sold under it, having first advertised it three or four times on both writs.

The lease was bid off to the plaintiff, at an adjourned sale. On the first day on which a sale was attempted the plaintiff attended and offered 5s., and the bailiff adjourned the sale, no one bidding more. The plaintiff on that occasion stated publicly that the lease was worth nothing, and that the tenant had no interest in it. There were several adjournments of the sale. It was at last sold on the 31st of March to the plaintiff for £3 15s., not by the bailiff, but by a person employed by him. The plaintiff paid the money bid, and the bailiff made the deed to him. There was no endorsement of the seizure made on the back of the writ. The proceedings on which the execution in Dempsey and Blevins' suit issued were proved.

At the conclusion of the plaintiff's case the defendant's counsel moved for a nonsuit, on the grounds: 1. That the law requires division court executions to be returned in thirty days; that the writ was not so returned, and therefore the plaintiff could not sell on it.

2. That the bailiff had no power to adjourn the sale.

3. That the bailiff could not legally sell a chattel real under a division court execution.

4. That there was in fact no seizure made, no entry of seizure made on the writ.

5. That the bailiff was not present, and did not sell, and that he could not depute another to sell for him.

Leave was reserved to defendant to move for a nonsuit in term on these objections.

The defendant then went into his case, and proved that on the first day when the sale was attempted, several persons present wished to bid, and several bids were made of trifling sums: that the plaintiff was present, and forbade the sale, saying it was his property: that the bailiff did not know what to do, and adjourned the sale: that at the day when the sale was made, and afterwards, the plaintiff stated several times that he went there to stop the sale, for that he did not wish to see the poor man's property sacrificed; that he had secured the property for him, and had been doing a friendly act.

It was proved, further, by the tenant of one of the six houses under the defendant, that he paid the defendant \$12 a month rent for that house, and he swore that he believed the defendant received £100 a year above the rent he was to pay to the plaintiff; that a tavern on the corner of the lot let at £90 a year.

It was proved also that the defendant at the time of the sale had personal property of much more value than the £3 15s.

A verdict having been found for the plaintiff.

*Durand* obtained a rule *nisi* for a nonsuit on the leave reserved, or for a new trial.

*Burns* shewed cause.

The clauses of the statute bearing upon the question determined are cited in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The first question in this case is whether under the execution from the division court a term for years could legally be sold. The statute, Consol. Stats. U. C., ch. 19, sec. 151, provides that "every bailiff or officer having an execution against the goods and chattels of any person, may by virtue thereof seize and take *any of the goods and chattels* of such person, (excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of 20 dollars, which shall to that extent be protected from the seizure,) and may also seize and take any money or bank-notes, and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money belonging to such person."

The words "goods and chattels" as used here, that is, without any words denoting an intention to distinguish between moveable and immoveable, do, as a general rule, we have no doubt, include chattels real as well as chattels personal, and that effect is given to them at common law, and without the aid of any statute, when they are found in writs of execution issued from the superior courts.

There is nothing in the clause we have cited which can be



taken to indicate an intention that personal chattels only, and not real chattels, shall be subject to seizure, but we do not believe that it has been generally taken to be legal to sell terms for years in real property under executions from the division court. We are not aware that it has been attempted to do so in any other case.

And it is to be considered that if because the words goods and chattels are in themselves large enough to embrace terms for years, such terms must therefore be held to be saleable under executions from the division courts, we could not refuse upon the same principle to hold that in every case of a warrant from a justice of the peace for levying a fine or a penalty, however trifling, and in all cases under the 187th and 188th sections of the division court act, a leasehold property of the defendant would be liable to be sold, for such warrants usually direct the money to be levied upon the goods and chattels of the party, and are authorised by statute to be issued in that form. Now we think we are safe in saying that terms for years are not in fact seized and sold under such warrants, and although it is not in all cases a conclusive argument that whatever has never hitherto been done under circumstances which are frequently recurring is not fit to be done, yet the want of precedent may be in general relied upon as a very strong argument in favour of the conclusion.

And there is in the division court act a strong indication that the legislature did not mean that the process of execution from such courts should extend to any thing but personal chattels. We refer to the sections, 199, 204, 206, 210, and the form of the writ of attachment against the goods of absconding debtors given in the schedule at the end of the act, as compared with the form of attachments directed by ch. 25 to be issued from the superior courts. The warrant to be issued to the bailiff of a division court in such cases is to "seize, take, and safely keep all the *personal* estate and effects of the absconding debtor *liable to seizure under execution for debt*," and not, as in the case of attachments from the higher courts to seize "all the real and personal property," &c. This shews, we think, that it was only the

personal goods of the debtor that are intended to be liable to seizure under execution from the division court, such chattels as are subject to distress and sale under warrants from justices or courts of inferior jurisdiction, and under by-laws, or otherwise.

Mr. Bradby in his treatise on distresses, p. 206, in which he treats not merely of distresses for rent, but of all cases in which goods may be seized and sold by a summary proceeding for the levying any fine or penalty, says, "It may be laid down as a general rule, that even at the common law all *personal* chattels are liable to be taken as a distress, unless they fall within some of those exemptions which will be hereafter specified."

We think it is in like manner only personal chattels, not real chattels, which can be seized under process from our division courts, though in all these cases the command is to levy the money from the "*goods and chattels*" without restricting expressly the meaning of those words. In *Gorton v. Falkner*, (4 T. R. 565,) Lord Kenyon says, "We may lay it down as a general proposition that at this time all *moveable chattels* are distrainable." This sanctions a distinction between moveable and immoveable goods, where undoubtedly the authority was to seize and sell "the goods and chattels."

In cases of sales of terms for years under execution from courts of record nothing passes by the mere sale of the lease. There must be an assignment by the sheriff, which is usually executed under his seal of office. Nothing less than this can support an ejectment by the purchaser, and except under certain circumstances he has also to prove a judgment on which the execution issued. Again, it has been determined that a portion only of the premises demised cannot be sold, for what the sheriff is supposed to sell is the lease itself, which is indivisible, so that in that case to make a few shillings or dollars, defendants' interest in the whole land demised, with the six tenements upon it, must all be sold, which was in fact done in this case by the bailiff.

It seems to us that it is not reasonable to suppose that the law could ever have intended that a lease for twenty or ninety-nine years, or for a much longer term, should be subject

to be seized and sold in execution by a bailiff or constable, who has no seal of office, and upon a warrant which has no judgment of record to support it, and a judgment from which there is no appeal. He can only sell, we think, such things as he can deliver over to the purchaser, or such securities as the 151st section of the statute expressly authorises him to seize.

There were several particular objections taken in this case to the proceedings, besides the main objection which we have been considering, but as we think the term could not have been sold under the execution from the division court, we do not go into these particular objections, such as the allegation, not distinctly proved, we think, that nothing was done towards seizing under the writ until after it was returnable, which would be a fatal objection if founded in fact. And on the evidence generally, we think we should not have been able to sustain the sale as a *bonâ fide* execution of the writ. It is a singular fact in the case, that the plaintiff, who bid in the term, was himself the owner of the reversion. The term would have merged in the fee the moment he acquired it, but I do not see that that would have prevented his sustaining this action of ejectment upon his title as reversioner, if by what has been done the term could be held to have been legally extinguished.

Rule absolute.

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IN THE MATTER OF FREDERICK STEWART MACGACHEN,  
APPLYING TO BE ADMITTED AS AN ATTORNEY AND  
SOLICITOR.

*Articled clerk—Service—Expiration of articles less than fourteen days before term.*

The time of a clerk articled after the 1st of July, 1858, must expire fourteen days before the term in which he seeks to be admitted, for the affidavit of due service cannot be accepted at a later period, though before his examination.

Where M., therefore, entered into articles for a year on the 25th of January, 1860, and Hilary Term began on the 4th of February, 1861, *held*, that he could not be admitted in that term.

Mr. MacGachen, who was called to the bar in England by the society of the Inner Temple on the 8th of June, 1849, entered into articles on the 25th of January, 1860, with a



practising attorney in this province, binding him to serve as a clerk for one year, in order that he might, after completing such service, be admitted an attorney, under Consol. Stats. U. C., ch. 35, sec. 2.

These articles expiring on the 25th of January, or rather, perhaps, on the 24th of January, 1861, there were not fourteen days between the time of service being completed and the commencement of Hilary Term, 1861, which began this year on the 4th of February, and it was therefore not in the power of Mr. MacGachen to comply with the third section of the act, which requires that such candidate for admission shall, at least fourteen days next before the first day of the term in which he seeks admission, leave with the secretary of the Law Society his contract of service, and an affidavit of due execution thereof, and of due service thereunder. See also secs. 5, 10, 24.

The society in consequence hesitated to grant him the certificate provided for in the tenth section, and made a special note of the facts in a certificate which they did grant of his having passed an examination as to fitness; and requested the consideration of the court upon the point whether Mr. MacGachen could be legally admitted.

The certificate stated that fourteen days before the commencement of the term the said articles, with an affidavit by Mr. MacGachen of due service thereunder up to the 19th of January, 1861, were left with the secretary of the Law Society; and that subsequently, but less than fourteen days next before the first day of the term, and after the expiration of the term mentioned in said articles, and before his examination, affidavits of himself and of the attorney to whom he was bound, proving that he had actually served and been employed by such practising attorney during the whole of his term of service, were presented to the convocation.

*Read, C.*, appeared for the Law Society, and *C. S. Patterson*, for the petitioner.

ROBINSON, C. J., delivered the judgment of the court.

We think the statute does not authorise the admission

during the present term, since Mr. MacGachen could not make and has not made an affidavit fourteen days before the term of having duly served under his articles, which must be taken to mean that he had completed his service for a year.

If it occurred to the legislature when they were passing the act that by requiring such affidavit to be furnished fourteen days before the term they would in some cases be exposing the candidate for admission to the loss of a term, they might perhaps have provided against that by allowing that affidavit to be filed at any time before he presented himself to be sworn in ; but the act does not so provide ; it rather affords evidence that the legislature was not disposed to guard against this inconvenience, except in cases of persons who had entered into articles before the 1st of July, 1858. See sec. 24.

There is no room for any latitude of construction in regard to this requisition of the statute, as there necessarily must be in some degree with respect to what constitutes service within the meaning of the act. It is quite clear that consistently with the statute, so far as regards the year's service being duly completed, the candidate must be in a situation to make the affidavit fourteen days before the term begins.

It will only be necessary that hereafter, in view of the possible loss of a term, care should be taken to enter into the contract of service a sufficient number of days before the term to escape the difficulty of not leaving fourteen clear days between the expiration of the articles and the term that will follow next after.

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## HARRISON V. BREGA.

*Registrar—Omission of mortgage in certificate—Action therefor—Notice of action and limitation—Consol. Stats. U. C., chaps. 126, 89—Damages—Costs of suit by first mortgagee.*

A registrar being applied to by the plaintiff for a certificate of the registries on a lot, gave one in which he omitted to mention a mortgage for \$600, prior to that which the plaintiff purchased, supposing it, from the certificate, to be a first encumbrance. The first mortgagee obtained a decree for sale, and the plaintiff purchased the land at less than would satisfy the two mortgages, but he soon afterwards sold at a considerable advance, so that in the end he would receive all that he had paid for his mortgage. In an action against the registrar for this omission in his certificate, the jury gave \$500 damages.

*Held*, that the registrar was not entitled to notice of action, and that the six months' limitation clause did not apply, for though an officer within the meaning of the act, Consol. Stats., U. C., ch. 126, this was not an act committed, but a negligent omission.

*Held*, also, that the damages were moderate, the plaintiff having in fact sustained loss to the full amount of the first mortgage.

The plaintiff having been made a party to a suit in chancery on the first mortgage endeavoured to obtain priority, but failed in his defence, and was compelled to pay costs. Whether these costs could be recovered from the registrar was a point raised, but not decided, as it was uncertain whether they were included in the verdict.

The plaintiff sued defendant, who was registrar for the county of Peel, for damages which he alleged he had sustained from the defendant having given an erroneous certificate as registrar of the state of the title to a certain parcel of land, upon which a mortgage had been given, and which mortgage the plaintiff proposed to purchase, and did purchase, relying upon the accuracy of the registrar's certificate.

The declaration contained two counts, but the first only was relied upon at the trial, and the other was abandoned.

The first count stated in substance that on the 15th of July, 1857, one Robert Campbell had made a mortgage of certain 175 acres of lot 6, in the 2nd concession south of Dundas street, in the township of Toronto, to James Farrell, and his assigns, to secure £600, with interest, which mortgage was registered by defendant on the 15th of July, 1857: that the plaintiff agreed afterwards to purchase the said mortgage from Farrell, for a certain sum of money to be paid for the same, provided it should be found by search at the registry office that this was the first incumbrance upon the land, as Farrell had represented it to be: that on



the 1st of September, 1857, the plaintiff required the defendant, as registrar, to search into the title, and to send a certificate, and paid him therefor; and the declaration charged that the defendant did not carefully search, and did not send a true certificate of the state of the title, but neglected his duty in that behalf, and erroneously and untruly certified that the mortgage to Farrell was the first undischarged mortgage or incumbrance created by Campbell on the land, or any part of it, which had been registered in his office: that the plaintiff relying upon this, and having no knowledge to the contrary, bought the mortgage from Farrell, and paid for it the price agreed upon, and took from him an assignment, which was duly registered on the 29th of September, 1857, whereas in truth Campbell, before he gave the mortgage to Farrell, had, on the 21st of August, 1854, made a mortgage on the same land to one James Speers, for £150, payable with interest, which mortgage was on the 29th of August, 1854, duly registered by defendant, as registrar, but all mention of it was omitted in the certificate given by the defendant to the plaintiff of the state of the title.

The plaintiff then averred that the debt of Campbell to Speers not being paid when due, Speers, after the assignment had been registered, filed a bill in Chancery to obtain a sale of the land: that the plaintiff, being made a defendant in that suit, endeavoured to make good his claim to priority as a *bonâ fide* purchaser of the second mortgage for value, without notice of the first, but failed in his defence: that the land was ordered to be sold to pay Speers' debt, interest, and costs, in the first place, and that when this was done, and the surplus of the proceeds applied towards the satisfaction of the plaintiff's mortgage, interest, and costs, which then amounted to £749 19s., it left a deficiency of £238 19s. 11d., and the plaintiff averred that he had thereby lost that amount, and interest from the 12th of October, 1860.

The defendant pleaded not guilty, by statutes, Consol. Stats. U. C., ch. 126, secs. 9, 10, 11, 20, and ch. 89, secs. 9 to 13 inclusive, and sec. 67.

At the trial, at Toronto, before *McLean*, J., the plaintiff produced defendant's certificate, as registrar, dated the 23rd of September, 1857, in which there was no mention made of the mortgage to Speers, and it was proved that long afterwards, when the plaintiff was informed of that mortgage, and of the intention of Speers to file a bill, his son, who transacted business for him as his attorney, wrote again to the registrar to request another search and certificate, and on the 11th of February, 1859, the defendant sent him another certificate in which also Speers' mortgage was omitted.

To both papers the registrar certified at the foot that they were correct to the best of his knowledge and belief.

A few days after the last certificate was received the plaintiff's son saw the mortgage given to Speers in the hands of his solicitor, and wrote again to the defendant stating this; and he then received from him a statement of the registry of Speers' mortgage on the 29th of August, 1854, with the remark, "The above was overlooked in consequence of not having been marked in the index."

It was proved at the trial that the plaintiff, when he bought Farrell's mortgage, did not give him the full £600 and interest for it: that Farrell's mortgage contained the usual covenant by Campbell to pay the money, but that Campbell was now insolvent: that when the land was sold by decree of the court of Chancery it brought £760: that the plaintiff afterwards bought it of the gentleman who had bid it off, giving him £25 for his purchase, and paying the price bid himself, and that he soon after disposed of the land for £1,000, of which £600 had been paid, so that the plaintiff would probably at least have received the full amount of the mortgage money, without bringing this action, but he would have paid more for it than he contemplated, and more than he would have had to pay if the defendant had done his duty accurately.

The defendant's counsel moved for a nonsuit on the grounds that no notice of action had been given, and that the action should have been brought within six months.

The learned judge reserved leave to move afterwards on

these exceptions, and told the jury that the defendant was liable for the damages occasioned by his mistake or omission : that by the sale which took place under the decree in Speers' suit, the lands passed into the hands of a stranger, at a price which would have left the plaintiff's debt unsatisfied to the amount of £238 10s., and that the plaintiff having indemnified himself to a great extent, if not fully, by his subsequent purchase of the land from another, and his re-sale of it at an advanced price, was not a matter of which the defendant was entitled to take advantage. He held that the plaintiff was entitled to recover the costs of his defence in the Chancery suit, but he desired the jury to give such amount of damages as they might think reasonable upon the evidence.

The jury gave a verdict for the plaintiff, and \$500 damages.

*M. C. Cameron* obtained a rule *nisi* for a nonsuit on the leave reserved ; or for a new trial on the law and evidence, for excessive damages, and for misdirection, contending that unless the plaintiff had sustained damage he was not entitled to recover, and at any rate not for more than his actual damage from the whole transaction, and that the true estimate of damage was the amount by which the two mortgages exceeded the actual value of the land. He contended also, that as the mortgage given to Campbell contained a covenant to pay the money, and as Farrell in his assignment to the plaintiff had also covenanted with the plaintiff that the mortgage debt should be punctually paid, it was incorrect to charge the jury that those covenants did not affect the plaintiff's right to recover substantial damages. He objected also that the plaintiff had no claim to recover his costs in Chancery in the foreclosure suit brought by Speers.

*Eccles*, Q. C., and *R. A. Harrison*, shewed cause. They cited Consol. Stats. U. C., ch. 126, secs. 1, 9, 10, 11, 20 ; ch. 89, secs. 9 to 13 inclusive, sec. 67 ; Common Law Procedure Act, secs. 3, 4 ; *McWhirter v. Corbett*, 4 C. P. 203 ; *Wallace v. Smith*, 5 East 115 ; *Greenway v. Hurd*, 4 T. R. 553 ; *Umphelby v. McLean*, 1 B. & Al. 42 ; *The Queen v. Kelk*, 1 Q. B. 660 ; *Davis v. Curling*, 8 Q. B. 286 ; *Carpue*



v. The London and Brighton R. W. Co., 5 Q. B. 747, 754; Kennet and Avon Canal Navigation v. Great Western R. W. Co., 7 Q. B. 824; March v. Port Dover and Otterville Road Co., 15 U. C. R. 138; Fletcher v. Greenwell, 4 Dowl. 166; Waterhouse v. Keen, 4 B. & C. 200; Shatwell v. Hall, 10 M. & W. 523; Palmer v. Grand Junction R. W. Co., 4 M. & W. 749; Atkins v. Banwell, 3 East 92; Henly v. The Mayor, &c., of Lyme, 5 Bing. 91, 107; Gibbs v. Trustees of the Liverpool Docks, 3 H. & N. 164; Sutton v. Clarke, 6 Taunt. 29; Gladwell v. Steggall, 5 Bing. N. C. 733.

*M. C. Cameron*, contra, cited *White v. Clark*, 11 U. C. R. 137; *Smith v. Shaw*, 10 B. & C. 277; *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492; *Joule v. Taylor*, 7 Ex. 58.

ROBINSON, C. J., delivered the judgment of the court.

The first question to be determined by us is whether the defendant, as a registrar, was entitled under the Statute Consol. Stats. U. C., ch. 126, sec. 20, to the protection given to justices of the peace and other officers as to notice of action, and the time within which actions should be brought. No doubt the registrar is a public officer, and if, after carrying out or attempting to carry out any powers given to him by the act, he should be charged with malfeasance, we do not at present see how it could be denied that he would be entitled to the protection given by that act, not merely to justices of the peace, but to every other officer fulfilling a public duty. But we think the statute is not to be extended to cases of mere neglect or malfeasance. Secs. 9 and 10 of the act indicate that, we think, plainly.

The case of *Davis v. Curling*, (8 Q. B. 286,) is different in its nature from the present, and does not support the defendant's claim to notice. The court there said that the defendant, a road surveyor, was charged with the positive act of laying gravel upon the road, and they did not consider that his doing so, and allowing it to remain there incumbering the road, could be reasonably regarded as a mere omission of a duty, as negligence or nonfeasance, and nothing else. They thought that the officer must be re-

garded as having committed a wrong in executing the authority given to him by the act, and so came within the words of the clause, which gives the protection where a person is sued for an act *committed* by him in pursuance of the statute, or under the authority of the statute.

The principal cases which bear upon this question were cited in the argument of this case. We have looked into them all, and in our opinion none of them go so far as to hold a notice of action necessary in this case, or that the limitation of time for suing applies. Both points in fact turn upon the same question of construction.

We do not think that we can hold that registrars are not officers within the act, but what this registrar is charged with is not an act *committed* in carrying the law into effect according to his erroneous idea of his duty, but a negligent omission to do what he had been called upon to do, by a person who had employed his services in his official situation, and paid him for the duty required of him. The late Chief Justice of the Common Pleas rightly stated the distinction, we think, in *McWhirter v. Corbett et al.*, (4 C. P. 208,) when he said that though the sheriff in acting upon a writ of *feri facias* was fulfilling a duty imposed upon him by the court under the common law, yet it was in a private matter, and that if it was intended to be included in the protection to public officers given by statute 14 & 15 Vic., ch. 54, it wanted explanation, by which he meant that the language of the statute did not make the application sufficiently clear.

As to the unfortunate omission in this case giving a good ground of action to the individual who has suffered damage by it, there can be no doubt we think on that point. A case like this must clearly come within the language used by the Court of Common Pleas in England, in their judgment in the case of *Henley v. The Mayor of Lyme*, (5 Bing. 107, 108); and it does not appear to us that there is any legal objection to the amount of damages. The jury were in fact not disposed, it would seem, to bear hard upon the defendant. Their verdict shews that, and they were right, for in the multitude of entries to be made by a registrar there is always a possibility of error. The mortgage to Speers, it has been

stated, escaped observation in the searches made, from the accident that the entry in the index was made in a wrong column, being included in entries of lots on the south side of Dundas street instead of on the north side. This might well happen, though it cannot be denied that it was an error which implies negligence, and that the person suffering from it has a claim to be made good.

No doubt it was pressed upon the consideration of the jury, as it reasonably might and naturally would be, that notwithstanding the plaintiff had this incumbrance to pay off, of which he had no knowledge, though he had taken the proper means to ascertain the truth, yet that he was after all in fact no loser by the whole transaction, for that he sold the property at last for an advanced price, which saved him from all loss and did even more than that. If the jury, in view of that circumstance, had given even less damages than they did, we should not have been surprised; but they took a reasonable course in giving the moderate amount which they did, though it was probably more than the defendant under the circumstances expected he would have to pay; and we cannot interfere on the ground that in fact the plaintiff sustained little damage, if any, for in fact he did suffer damage just to the extent of the incumbrance of the first mortgage, in this sense, that but for the defendant's mistake his bargain would have been so much more profitable to him than it turned out to be.

As to the defendant's costs in the Chancery suit, we cannot tell that the jury allowed them, but must rather infer that they did not, since they gave little more than half the amount of the first mortgage, which had to be paid out of the proceeds of the sale of the property.

Rule discharged.

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## THOMAS V. WILSON, TULLY, WILLCOCK, AND LEE.

*City corporation—Gaol committee—Laying corner stone—Entertainment—Order given by committee for wines, &c.—Refusal by council to pay—Liability of committee.*

Defendants were a committee of the city council to inspect and superintend the building of a gaol. It was determined at a meeting of the committee, that there should be a ceremony on the occasion of laying the corner stone, and a luncheon given in St. Lawrence Hall; and one of the defendants, the chairman, gave an order addressed to the plaintiff as "commission merchant," for the supply of certain wines specified, to be sent to the St. Lawrence Hall, directing him to render his account to the board of gaol inspectors. The plaintiff sent in his bill to the chamberlain's office, headed "K. T., chairman, board of gaol inspectors, bought of G. Thomas, agent." The council however refused to sanction the expenditure, and he then sued the members of the committee who were present at the meeting when the order was given.

*Held*, that they were personally liable, and that the plaintiff might sue in his own name.

One of the defendants, the mayor, was present at the meeting referred to, and at first objected to the expense, but when told that it would be less than he had heard, he did not persevere in his opposition. He afterwards wrote to the chairman to say that he would attend the ceremony, but would not be at the luncheon, because he was obliged to leave town on business, and because he disapproved of so great and unsatisfactory an expenditure by the committee.

*Held*, not sufficient to exempt him from liability with the others.

ACTION on common counts, for goods bargained and sold, moneys paid, &c., and on account stated.

The defendants pleaded never indebted.

At the trial, at Toronto, before *McLean, J.*, it appeared that the defendants were members of the gaol committee of the city council, Mr. Wilson *ex-officio*, as mayor, and the others by appointment of the council. On the 21st of October, 1859, it was determined in this committee to lay the corner-stone of the new gaol on the 25th, and that there should be a ceremony on the occasion, at which the Masonic body should be invited to attend: that a luncheon should be given on that day at St. Lawrence Hall, and 400 tickets for the luncheon distributed, of which six were to be placed at the disposal of each member of the city council, and six at the disposal of the mayor; refreshments were also to be given to the fire brigade.

The ceremony did take place on the day, and the luncheon. The mayor, Mr. Wilson, was present at the former only, being obliged to leave town on professional duty in the afternoon.

The plaintiff, on the 28th of October, sent in a bill to the city council, that is, to the chamberlain's office, for champagne, and porter, and ale furnished by him on that occasion, amounting to \$297.60. This was headed thus, "Kivas Tully, Esq., chairman board jail inspectors, bought of G. Thomas, agent."

The gaol committee passed it at \$296, making a small deduction of a charge for cartage. This amount came afterwards, with various others for expenses incurred in connexion with the ceremony of laying the corner stone, before the chairman of the finance committee of the city council. They passed some small bills for other items, amounting to \$91.25, but all the accounts for refreshments, including the plaintiff's bill, and amounting in all to \$902.35, the committee referred to the city council for their consideration.

The council, it seemed, declined to sanction the payment of them; and the plaintiff consequently brought this action against the members of the gaol committee who were present at the meeting of that committee on the 21st of October, and sanctioned, as he contended, the order which Mr. Tully, one of the defendants, gave as their chairman, which order was produced on the trial, and proved. It was dated the 22nd of October, and was addressed to the plaintiff as "commission merchant." It fully and expressly authorised the supply of liquors for which the plaintiff claimed, both as to quantity and price, and directed the things to be sent to the St. Lawrence Hall on the 25th of October, and the account to be sent to the board of gaol inspectors.

Some of the champagne and porter, which had not been consumed, was returned, and was credited in the bill sent by the plaintiffs.

The defendants Tully, Willcock and Lee, were examined for the plaintiff at the trial, and the assistant clerk of the city council was also called as a witness.

As regarded the defendant Mr. Wilson, on the 24th of October, 1859, he addressed a note to Mr. Tully, the chairman of the gaol committee, which was read at the trial, and in which he said "I will of course attend the procession tomorrow, because the council has sanctioned it," (meaning the

city council,) "but I will not be able to attend at the festivities in St. Lawrence Hall, firstly, because I must leave this at 4.55 in the afternoon, for L'Original, &c., and secondly, because I disapprove of so great and unsatisfactory an expenditure by the committee, by no means warranted in my opinion in the present distressing times." And it was proved that on the 13th of December, 1859, Mr. Wilson, being then still mayor of Toronto, wrote thus to the plaintiff: "Your account for wines, &c., against the person who ordered them has not been recommended to be paid by the finance committee, but has been referred to the council. The matter has not been taken up yet in council, and what may be done it is hard to say. There is a strong feeling against the payment of this expenditure, and it may be that resort must be had to the parties who procured the articles."

According to the account given by the witnesses who were examined, Mr. Wilson was present at the meeting of the gaol committee on the 21st of October, when the arrangements respecting the luncheon and the invitations to it were discussed, and saw and tasted a sample of the wine which it was proposed to order from the plaintiff; but he seemed unwilling to sanction so great an expense for refreshments as he understood they were likely to amount to, and mentioned \$1600 as the sum he had heard spoken of. He was told that they would not exceed \$900 or \$1000, and then appeared to the others to acquiesce, saying that that would not be much, and seeming to think that there would be no difficulty in council in sanctioning that amount.

It was sworn by Mr. Tully, that when he received Mr. Wilson's letter of the 24th of October, the orders for refreshments, wine, &c., had been given, and it was too late to countermand them, as the invitations had gone out, and the luncheon must take place.

The defendants called no witnesses on their part, but took a number of legal exceptions to the plaintiff's claim, one or two of which were specially urged by Mr. Wilson's counsel as reasons applying particularly to him. Both parties agreed that a verdict might be given for the plaintiff for £79 18s. 5d., and that leave should be reserved to the defendants to



enter a nonsuit, the court to be at liberty to draw all such inferences as a jury might do.

*C. S. Patterson*, for the defendant Wilson, obtained a rule *nisi* for a nonsuit on the following grounds :

1. That there was no proof on the trial, as against him, of the delivery of any goods for which this action was brought.

2. That there was no delivery of any goods.

3. That the plaintiff was shewn to have sold the goods as an agent, and his principal was shewn, and it was not proved that he had any personal interest in the transaction.

4. That the defendants were shewn to have acted only as a committee on behalf of the corporation, and were therefore not personally liable.

5. That the defendants had authority to contract on behalf of the city.

6. That the plaintiff knew he was dealing with the defendants as public officers, and gave credit to the city corporation when he sold the goods.

7. That the defendant Mr. Wilson did not authorise the defendant Tully to act in his name in giving the order for the wine, &c., or to pledge his credit.

8. That the defendant Wilson by his letter, before any of the goods were delivered, expressly stated to Mr. Tully that he did not authorise the purchase thereof.

*Harman*, for the other three defendants, obtained a rule to shew cause why a nonsuit should not be granted on the same ground as the first six taken by Mr. Wilson; and on the additional ground, that if Mr. Tully gave any order for the goods it was as chairman of the committee, and that there was no evidence that he had any intention to pledge his individual credit, or had authority to pledge or did pledge the credit of the other defendants personally, or of any of them.

*M. C. Cameron*, shewed cause, and cited *Braithwaite v. Skofield*, 9 B. & C. 402; *Lake v. The Duke of Argyle*, 6 Q. B. 477.

*Connor*, Q. C., and *Harman*, supported the rule obtained for defendants Tully, Willcock, and Lee, citing *Chy. on Plg.*

vol. i., p. 7; Add. on Con. 646, 647; Lewis v. Nicholson, 21 L. J. Q. B. 311; Evans v. Evans, 1 Har. & Wool. 239; Bank of Montreal v. DeLatre, 5 U. C. R. 362; Foster v. Geddes 14 U. C. R. 239; City Bank v. Cheney 15 U. C. R. 400; The Queen v. Eyton, 3 E. & B. 390; Burnside v. Dayrell, 3 Ex. 231; Brown v. Austin, 1 Mass. 208; Dawes v. Jackson, 9 Mass. 490; Walker v. Swartwout, 12 Johns. 444; Bank of Columbia v. Patterson's administrator, 7 Cranch 299; Owen v. Gooch, 2 Esp. 569.

*C. S. Patterson*, for defendant Wilson, cited Jenkins v. Hutchinson, 13 Q. B. 744; Lewis v. Nicholson, 18 Q. B. 503; Collen v. Wright, 7 E. & B. 301, 8 E. & B. 647; Thomson v. Davenport, 2 Sm. Lea. Cas. 212.

ROBINSON, C. J., delivered the judgment of the court.

The case is before us only upon the legal exceptions moved as grounds of nonsuit. There is no application for a new trial.

Nobody can doubt, we think, on reading the evidence, that the plaintiff has a just claim to be paid for his wine and other liquors furnished, for he supplied them upon an order that was very explicit, and there is no complaint that he did not comply exactly with it.

The question is, can he look to these defendants for payment. Whether the city could have been held upon the evidence to be legally bound to the plaintiff, cannot come up directly as a question in this action, for the corporation of Toronto is not sued; but it is attempted to bring up that question indirectly as a ground for holding these defendants not liable by contending that the corporation could be compelled to pay the plaintiff, and that it must therefore follow as a consequence that there can be no recovery against these defendants.

We must consider first those exceptions which are urged by all the defendants, and afterwards those which more immediately relate to Mr. Wilson, though from the peculiarity of the law as regards contracts, either express or implied, those particular objections in their effect are equally available in favour of all, for either the plaintiff can sustain his

demand against all the defendants, or he can recover in this action against none.

As to the first and second objections, that the plaintiff gave no proof that he had delivered any goods, that can hardly be seriously urged, for we find that a large quantity of liquors was ordered by the defendant Tully three days before the luncheon was given, and of just such liquors as are charged for, and at the prices charged, and when we find the gaol committee acknowledging the justice of the account as regards amount, in which credit was given for a small portion of the liquors returned, we can have no doubt, and the jury we dare say had none, that the rest found their way to the St. Lawrence Hall, on the 25th of October, and were consumed there at the luncheon, which was arranged, given and superintended by the committee.

In saying this we are leaving out of view at present whatever ground there may be for drawing a distinction between Mr. Wilson and the other three defendants, his colleagues in the committee.

We do not think that the third objection, namely, that the plaintiff appears to have sold the goods as agent, is material. The chairman of the committee sent his order to the plaintiff as a commission merchant. Nobody else that we hear of is claiming payment. There was no proof on the trial that the goods were the property of any one else, but only a surmise to that effect. It is of no consequence to the defendant where the plaintiff procured them. If he sold them as a commission merchant, or was in fact agent in any way for some third party who owned the liquors, that would not prevent him from suing for them in his own name. That is constantly done in mercantile transactions. The circumstances of a particular case may disable a commission merchant or agent from suing in his own name, though as a general rule there is no objection, where the contract is with him, and no principal was disclosed. Here we see nothing in the evidence that should disable the plaintiff from suing, though he may have been agent for some body in regard to the sale of these liquors, or some of them.

The fourth objection is that the defendants were acting



as a committee on behalf of the corporation, and are therefore not personally liable. The evidence, we think, when carefully considered, does not warrant us in holding that they were acting for the corporation in ordering these quantities of champagne and porter. They were acting on behalf of the city, it appears, in inspecting and superintending the building of the new gaol, but we cannot hold that that gave them any discretion, still less an unlimited discretion, to pledge the funds of the city to an expensive entertainment, in order to celebrate the laying the corner-stone. If it could have been shewn that it was within the scope of the duties and authority of the city council to expend the city funds in an entertainment of this description, to be given upon such an occasion, and next that the council did agree to do it, and next that the plaintiff was given to understand that it was to the corporation he was to look for his payment, and not to the committee, from whom he received his order through the chairman, then he might be referred to the corporation for payment; but we think the evidence does not establish any of those points. Appearances are much to the contrary, for Mr. Tully ordered the things as chairman of the committee, and he desired the plaintiff in his note to send his account to the board of gaol inspectors, which the plaintiff did, charging them in the name of Mr. Tully, the chairman. The circumstance of the bill being left in the city chamberlain's office, if it was left there, would signify nothing, for the committee probably, like other committees of the council, held their sittings in the city hall, or in one of the offices, and any such papers intended for them might properly be left in the office of the chamberlain.

The fifth objection is that the defendant had authority to contract on behalf of the city. We do not think that we can say we have evidence of this. It is not to be implied from what we know or may suppose to have been the duties committed to them. Ceremonies of this description, to commemorate the laying the foundation of public buildings, are frequent. Sometimes an entertainment such as was given here forms a part of the proceedings, but very often it is otherwise; and whatever argument might be raised upon

the point whether the city council could or could not legally, by by-law, or resolution, or in any way, apply the city funds to such a purpose, there can be no room for maintaining that the gaol committee could of their own authority, and without the direct sanction of the council, pledge the credit of the city for such an expenditure. We cannot imagine that they believed at the time that they could do so. They rather relied, we think, on the presumed willingness of the city council to confirm what they were doing, and confiding in that ventured to give their order.

As to the sixth ground of nonsuit, can we truly say that it is clearly founded in fact? Can we hold that the plaintiff gave credit to the city corporation when he sent or sold his goods? We do not see that proved. He may have supposed, if he thought about it, that there was a good understanding between the city council and the gaol committee on the subject, and that the money would come out of the city funds; but we have no authority for saying that he contracted upon that footing, and agreed to look to the city, and not to Mr. Tully or the committee. It was sufficient for him to know that he had his order from Mr. Tully, which would at any rate bind him, and might or might not bind others, according to circumstances.

If by objecting that he knew he was dealing with public officers, it is meant that the rule would apply in such a case which was laid down in *McBeath v. Haldimand*, (1 T. R. 172,) in our opinion we cannot carry the principle to that length. The gentlemen composing this committee were not public agents of the government. The plaintiff had not, for any thing that we see, reason to know or to believe that the city would be liable for any goods he might furnish. If he considered their charter he might doubt whether they could make themselves liable, and if he were satisfied they could, he would still have been bound to enquire whether they had done so.

We do not think that the defendants can rely in this case upon any implied assumpsit, because the members of the corporation partook of the luncheon in St. Lawrence Hall. They did so in common with others, and if we should look

upon the rest of the company as the guests of the city, and that every thing that was furnished at the luncheon must in that sense be looked upon as accepted and enjoyed by the city, there would still remain the question whether what was so accepted and enjoyed was something done within the proper scope of the charter, so that an undertaking to pay for it would be implied against the city, as it would for the materials that have been used in building the gaol. We are not prepared to accede to the doctrine that there would be any such undertaking implied.

The seventh and eighth points raised concern Mr. Wilson alone directly; but, as we have already said, they would be equally grounds of nonsuit in favour of all the defendants, as this kind of action must succeed against all or none.

There is more difficulty, we think, in disposing of these objections than of the others. The evidence does, however, we think, support the conclusion that on the 21st of October, Mr. Wilson, being present at the meeting of the committee as a member of it, heard and knew that it was proposed to order the luncheon, including the wine, which those who took the trouble of the arrangement should think must form a part of it. According to the evidence, Mr. Wilson came to the meeting in a state of doubt and hesitation about incurring such an expenditure as he understood would be called for if the committee carried through the intention which it seems had been talked of. He thought there would be difficulty in the committee getting the council to go with them if the amount was to be so large as he had heard, but when told that it would fall short of that, and would not be more than \$1000, then, according to the evidence, he gave up his objection, and acquiesced in what the others agreed to. Taking that to be so, and so far as we have gone at present we have no evidence to the contrary, he cannot say, any more than his colleagues, that the plaintiff should go unpaid because the corporation of the city refused afterwards to pass any by-law or resolution, or to do any thing that can give the plaintiff a legal claim upon them.

But there is still the fact that on the 24th of October Mr. Wilson wrote to Mr. Tully that he would not attend at the



festivities, giving as a reason that he disapproved of so great and unsatisfactory an expenditure by the committee. Should that exempt him from liability with the others? We think hardly, though we have had doubts upon that point. It amounted to nothing more than this, that he would not countenance the festivity because he disapproved of it on account of the expense, in which he would find, we think, many to be of his opinion; but the objection went to the whole preparation that had been made, not to the wine only. It was too late probably to countermand much of what had been ordered, and the letter hardly amounted to the expression of a determination or wish to do so, but rather perhaps to a declaration that he had been dragged unwillingly, as most men occasionally are, (sometimes when they are out-voted, and sometimes when they are not,) into a measure which he did not heartily come into, and would therefore not enjoy being present at the luncheon, but would rather be out of the way. It does not amount to a denial of any responsibility in common with the others for any thing that had already been resolved on at the meeting of the 21st. We dare say none of the defendants imagined that they would be left to pay for what had been ordered, but all hoped and believed that the city council would vote the money. It is besides to be considered, that for all that appears the plaintiff was left to suppose, as well after this letter of the 24th was written to Mr. Tully as before, that he was to furnish the wine ordered by the committee, and to charge the committee with the amount.

Rule discharged.

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BURWELL V. THE PRESIDENT, DIRECTORS, AND COMPANY  
OF PORT BURWELL HARBOUR.

*Harbour company—Injury to land—Liability.*

The plaintiff owned land upon a creek running into lake Erie, at the mouth of which defendants, incorporated by 12 Vic., ch. 160, constructed their harbour. A straight cut had been previously made by another company, of which the plaintiff had been secretary, from the creek, at or a little below his land, to the lake. While defendants were making their harbour, the plaintiff requested them to deepen this cut, which they did, and at his request placed on his land the earth which they dredged up. Before the defendants began their work, the plaintiff had piled along the front of his lot on the stream, but they did not pile along the land lower down, and the water being driven up from the lake by high winds, spread over this land and ran from thence on to the plaintiff's land, getting behind the piles which he had placed.

*Held*, that defendants were not liable for the injury thus caused.

The declaration stated that the plaintiff before and at the time of committing the grievances complained of, was owner in fee of certain lands in the village of Port Burwell, (describing them,) upon which, and along and upon Otter creek, there had been constructed by the plaintiff certain piers, wharves and buildings, of great value: viz., &c.; yet that the defendants, well knowing the premises, heretofore, and within six years next before the commencement of this suit, negligently constructed and caused to be constructed their harbour and works on Otter creek, and negligently and wrongfully left unprotected the banks of the said creek immediately above the said works from the action of the waves and waters from lake Erie, so that the waters and waves from lake Erie washed upon and against the wharves, piling, and lands of the plaintiff immediately above the works of the defendants, and carried away and destroyed the same.

The defendants pleaded not guilty, by statute 12 Vic., ch. 160.

At the trial, at London, before *Draper*, C. J., it appeared that the plaintiff before the defendants began their improvements at Port Burwell, for constructing a harbour at the mouth of the creek, under powers given to them by statute 12 Vic., ch. 160, owned three village lots, which came down to the natural bank of the stream, at or a little above the point at which a straight cut made from the natural bed of the creek to the shore of lake Erie left the stream. His

complaint was that in consequence of the defendants having deepened the straight cut spoken of, which had been made before their time by a former company or association of persons, of which the plaintiff was secretary, and in consequence of the defendants not having sheet piled a lot or lots owned by private proprietors, Scott and Wilkes, which laid south of the plaintiff's lots, (that is, lower down the stream,) the water of the lake, which by high winds was sometimes driven up past these lots, had washed away the soil thereof, and had thus reached the lots of the plaintiff and done him injury.

The evidence shewed that after the defendants were incorporated, and while they were making their harbour, following up and making more convenient and capacious the straight channel up the creek, which had before been made by the old company to which the plaintiff belonged, the plaintiff requested the defendants to dredge out the channel up to his lots, so as to make it deeper: that they did this, and turned out at his request the earth which they got up by dredging upon his lots, which before were low and swampy. It was proved that before any thing had been done by the defendants, the plaintiff had himself had the front of his lots sheet piled; that the defendants had not sheet piled along the front of Scott and Wilkes' lots, which intervened between his lots and the land of the defendants lower down in the channel; and that the water driven up the creek by high winds from the lake, had spread itself over the front of these lots, which were low and swampy, and had thus got behind the piles which the plaintiff had placed along the front of his lot, and by washing away some of the soil had produced such injury as he complained of, though it seemed from some of the evidence not to the extent stated on his part.

The evidence given presented several questions which the learned Chief Justice found it necessary to submit to the jury, with the view of ascertaining their opinion as to the cause of any damage which the plaintiff's lot might appear to them to have sustained.

The jury accordingly considered that question, and they specially found that the plaintiff had sustained damages to



the extent of \$300, in consequence of the neglect of the defendants in not extending their works a sufficient distance; that is, in not sheet piling along the front of the lots owned by Scott and Wilkes.

It was agreed at the trial that the defendants should have leave reserved to them to move to have a verdict entered in their favour, or a nonsuit, if the court should be of opinion that the defendants were not liable to an action for an injury so occasioned.

*Eccles*, Q. C., obtained a rule *nisi* accordingly. He cited *Abraham v. The Great Northern R. W. Co.*, 5 Eng. L. & E. Rep. 258.

*J. Wilson*, Q. C., shewed cause, and cited *Thompson v. Gibson*, 7 M. & W. 456; *Allen v. Hayward*, 7 Q. B. 960; *Lawrence v. The Great Northern R. W. Co.*, 16 Q. B. 643; *Young v. The Grand River Navigation Co.*, 12 U. C. R. 75.

ROBINSON, C. J., delivered the judgment of the court.

The evidence given on the trial shewed that it was not the defendants who made the straight channel leading down from the plaintiff's land to the lake, as a substitute for the natural stream, which found its way to the lake by a circuitous course. That new channel had been made before by an association of persons not incorporated, of which association the plaintiff had been secretary. The plaintiff at that time, in order to secure the front of his lots from the encroachments of the water that might thus wash up from the lake, and to make his land firm and fit for shipping purposes, so that he could take advantage of the improvement which would admit vessels up to his premises, drove piles in front of his land; and these remained, and his lot was in that state when the defendants, a public company, were incorporated for the purpose, as we must suppose, of making a more convenient and secure harbour. The plaintiff then, it appears, when the defendants were going on with their work requested them to dredge this channel deeper, which led up to his land, and they did so, and as he desired laid back upon his land the soil which they got up by dredging. He could not complain of that as culpable negligence on the part of the defendants which was an

act done at his request; and, besides, the plaintiff does not in his declaration attribute what happened to the fact that the defendants had made deeper than it was before the channel leading from his land direct to the lake, which had before been made by others; neither does the evidence shew that the mischief arose in fact from that cause, nor did the jury find that it did. The wash from the lake would be gradual in its effects, and it may first have become injurious to the plaintiff in the time of the defendants; but that would not make them liable, nor would they be liable, if a more boisterous season than usual, or higher water than usual, from other natural causes, happened in their time, and occasioned more mischief than had occurred before, when the waves from the lake could flow, and did flow up to the plaintiff's land, through a cut which had been made by the other company.

It seems to us that for these reasons the plaintiff had no claim to damages, and that it is unnecessary to go into other questions that have been raised upon the powers given to the defendants under their charter.

We think a nonsuit should be entered.

Rule absolute.

## REGINA V. JUDY McEVOY.

*Indictment—Quarter sessions—Jurisdiction—Capital offence.*

At the quarter sessions the prisoner was found guilty on an indictment charging that she, on &c., in and upon one B., in the peace of God and of our lady the Queen then being, unlawfully did make an assault, and him, the said B., did beat and ill-treat, with intent him, the said B., feloniously, wilfully, and of her malice aforethought, to kill and murder, and other wrongs to the said B. then did, to the great damage of the said B., against the form of the statute in such case made and provided, and against the peace, &c. A count was added for common assault.

The evidence shewed an attempt to murder, but it was moved in arrest of judgment that the court had not jurisdiction, for that it was a capital crime, under Consol. Stats. C., ch. 91, sec. 5.

*Held*, that the indictment did not charge a capital offence under that section, nor an offence against any statute, but that the conviction might be sustained as for an assault at common law.

This was a case reserved from the quarter sessions of the county of Hastings.

At the general quarter sessions held in December last, the

defendant was tried and found guilty upon an indictment which charged that the defendant, "on the 27th of November, 1860, in and upon one Alexander Buchan, in the peace of God and of our lady the Queen then being, unlawfully did make an assault, and him, the said Alexander Buchan, did beat and ill-treat, with intent him, the said Alexander Buchan, feloniously, wilfully, and of her malice aforethought to kill and murder, and other wrongs to the said Alexander Buchan then did, to the great damage of the said Alexander Buchan, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity."

With a count added for a common assault.

It was moved in arrest of judgment that the quarter sessions had not jurisdiction to try the offence, for that it was a capital crime by ch. 91, Consol. Stats. C., sec. 5.

It was said, on the other hand, that the prisoner was not indicted under that statute. The point was reserved for the consideration of this court.

The evidence was distinct and positive, and was such as must have satisfied the jury that the prisoner, with some kind of weapon, and probably a wooden beetle, which was afterwards found with blood upon it, had at night attempted to murder the prosecutor, a clergyman between 50 and 60 years of age, as he lay asleep in bed. He received several blows in the head, which cut the skin, and occasioned the blood to flow freely.

*R. A. Harrison*, for the Crown, cited Consol. Stats. U. C., ch. 17, secs. 1, 2; 18 Ed. III., ch. 2; 34 Ed. III., ch. 1; 5 & 6 W. IV., ch. 76, sec. 107; *The King v. Higgins*, 2 East 6; *Regina v. Dunlop*, 15 U. C. R. 118; *Com. Dig.*, "Justices of Peace," B. 3; *Dickenson's J. P.*, 4th Ed., p. 131.

*Sisson*, contra.

ROBINSON, C. J., delivered the judgment of the court.

We cannot satisfy ourselves under what statute the prisoner was intended to be indicted, for although the indictment does charge an assault with intent to murder, yet it does not con-



tain a statement of such an assault or other offence as brings the case within either the 5th or 6th clauses of the statute, Consol. Stats. C., ch. 91.

The evidence was such as might well have supported an indictment under the 5th clause, for wounding the prosecutor with intent to murder him, or, according to some authorities, for "*cutting*" with intent to murder, though on the latter point there is probably room for doubt, but this indictment is not so framed as to bring the case under the 5th clause in any way. Neither does the indictment contain a charge of an aggravated assault under the 8th section of the same act. We do not suppose the indictment was framed with any view to that clause, for then the offence would not have been charged, as it is, to have been committed feloniously, or with intent to murder.

The indictment certainly does not charge a capital crime, though the facts proved would have warranted such a charge under the 5th clause of ch. 91, nor does it properly state a crime under any statute.

We should either, we think, arrest the judgment under our statute, Consol. Stats. U. C., ch. 112, sec. 3, or direct judgment to be given as for a misdemeanour at common law.

The question as to whether the quarter sessions had jurisdiction would have come up if the offence had been one within the 5th clause of ch. 91, but as it is that question is not presented.

We are of opinion that the indictment does not sufficiently charge a felonious assault with intent to murder, under the 5th section of the statute, ch. 91, nor any offence against that or any other statute, but does charge in each count what may be treated as an offence at common law, rejecting from the first count the words, "contrary to the statute," as surplusage, and any other words which are insufficient to sustain a prosecution for felony under any statute.

We have hesitated between the course of reversing or annulling the conviction, and sustaining the conviction as for an assault and battery at common law, but adopt the latter course, first, because the statute ch. 112, Consol. Stats. U. C., sec. 4, directs that where the judgment shall be arrested

upon a reference from the quarter sessions to a superior court the prisoner shall be discharged from custody, which in this case would be improper; and secondly, because we doubt whether we could properly arrest the judgment where the indictment, though framed imperfectly as for an offence against a statute, does contain a sufficient charge of an offence at common law.

We therefore shall certify to the quarter sessions that the prisoner has been legally convicted of a common assault and battery, and should be punished accordingly.

### VANBROCKLIN V. THE CORPORATION OF THE TOWN OF BRANTFORD.

#### *Lease—Covenant to renew—Breach—Measure of damages.*

Defendants leased certain land to one W. for eight years, on which the lessee covenanted to erect a good house during the first year, and the plaintiffs covenanted to grant a renewal lease for ten years at the expiration of the term, at a rent to be fixed by arbitration. The defendants were unable to renew, owing to a decree of the Court of Chancery, declaring that they had no power to grant the lease. The buildings, which were of wood, were removed, and sold under execution against the plaintiff, who had purchased the term two years before it expired for \$3000.

In an action against defendants on their covenant to renew:

*Held*, that the plaintiff was entitled to recover the value of the occupation of the premises, with the buildings, above the probable ground rent, for the term which he had lost; and that \$2500, the amount of the verdict, found, was not excessive.

*McLean*, J., dissenting, and holding that he could recover only nominal damages, on the grounds, 1. That for the renewal term he would be liable to pay rent upon the buildings as well as the land, and 2. That in the absence of fraud he could not recover for the loss of his bargain.

This was an action for breach of a covenant to renew a lease for a term of ten years. By the lease, a term of eight years from the 23rd of February, 1851, was granted by the defendants to one Wade, at a rent of £18 a year.

The lessee covenanted to erect upon the premises within the first year of the term, at his own cost and charges, a good substantial messuage or tenement, not less than 34 feet long by 24 feet wide, and two stories high, and to keep it in a proper state of repair during the term. And the defendants covenanted with the lessee, his executors, &c., that they would, if thereto requested in writing by him, his executors, administrators, or assigns, six months before the

expiration of the term, grant a further lease of the premises to him, his executors, administrators and assigns, for the term of ten years, to commence at the end of the former term, at such yearly rent as should be fixed by two arbitrators, one to be chosen by each party, &c.; such renewal lease to contain like covenants to those in the first lease, except the covenant to renew.

The declaration set out several successive assignments of the original term, through which the term became vested on the 13th of January, 1857, in this plaintiff, who purchased the same from one Robert Mellish for £750, and entered into possession: that Wade and his assigns paid to the defendants the rent reserved, and within the first year of the term built a substantial house upon the premises, according to the covenant in the lease, and kept it in good repair: that confiding in the defendants' covenant to grant a further term, the lessee, Wade, invested large sums of money upon the premises, to enable him or his assigns to rent or sub-let the same for a larger sum of money than they were bound to pay to the defendants for their rent, and built thereon divers other buildings and erections; and that, although Wade and his assigns had performed all covenants on their part, and although the plaintiff, as assignee of the term, did, six months before the end of the term of eight years, request the defendants in writing to renew for a further term of ten years, according to their covenant, yet the defendants had not granted to the plaintiff such further term, but refused to grant the same, contrary to their covenant; whereby the plaintiff had been deprived of the rents and profits which would during the further term of ten years have accrued to him, and would be deprived of the large sum of money invested by him in the purchase of the said leasehold premises, &c.; and that the said buildings so erected were of little or no use to the plaintiff.

At the trial, at Brantford, before *Hagarty, J.*, it was proved that the plaintiff had given in land the value of \$3000 for the unexpired term, which he purchased in January, 1857, so that, as the lease had then but about two years to run, it seemed that the plaintiff must have had chiefly in



view the value of the second term that had been stipulated for in the lease. It was proved that the plaintiff was receiving from sub-tenants about £160 a year. The buildings that had been put up were of wood, and the defendants allowed the plaintiff to remove them from the land demised, and they were so removed by him, or rather were sold for his benefit under an execution, and were removed by the sheriff's vendee. What had been bid for them did not appear.

The learned judge told the jury that he did not consider the case to be one in which nominal damages only could be claimed; that on the other hand, as the lease made no special provision, but in fixing the rent for a renewal lease of ten years, if one had been granted, the arbitrators were to confine themselves to the question of a fair ground rent, not taking into account the value of the buildings which the tenant might have put upon the premises, he thought the jury might properly take into consideration that if the term had been renewed the tenant would have had an increased rent to pay in proportion to the enhanced value of the premises: that looking at the case in that light, they had to consider what damage the plaintiff could be fairly said to have sustained from being disappointed in not obtaining a renewal, not, as it appeared, from any wilful neglect or refusal of the defendants, but because they had ventured to enter into a covenant which they afterwards found themselves unable to perform. (a)

The plaintiff's counsel contended that the renewal must have been intended between the parties to be granted at a rent which the arbitrators should think fair for the ground alone, and which would have left to the tenant all profit to be made by occupying or leasing the buildings.

Finally it was left to the jury to value the place as it would naturally have been valued under the lease, not necessarily or at all events at an increased rent, or at least without any direction that they were to take it for granted that the re-

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(a) The judgment in *Wade v. The Corporation of Brantford*, 19 U. C. R. 207, on demurrer, explains the reason which prevented the defendants from performing their covenant to renew, and the view which was taken of their liability to damages in consequence.

newed rent would have been fixed upon a computation of the improvements by buildings. The jury gave \$2500.

*Crombie* obtained a rule *nisi* for a new trial, on the ground of misdirection, or rather of the want of any precise direction in regard to the computation of damages; and because the jury were told that they should give damages to the plaintiff in respect of the buildings upon the premises demised; and also because the damages were excessive.

*M. C. Cameron*, shewed cause.

*Freeman*, Q. C., and *Hardy*, supported the rule, citing *Worthington v. Warrington*, 8 C. B. 134; *Pounsett v. Fuller*, 17 C. B. 660; *Williams v. Burrell*, 1 C. B. 402; *Flureau v. Thornhill*, 2 W. Bl. 1078; *Vallier v. Walsh*, 6 C. P. 459; *Sedgwick on Damages*, 2d Ed. 184; 3rd Ed. 189-90; *Sug. V. & P.*, 11th Ed., p. 424.

ROBINSON, C. J., delivered the judgment of the court.

We think we must consider, that if the defendants had found themselves in a situation to grant a renewal lease, as they had undertaken to do, the rent to be fixed by arbitration for the ten years to come *would* (by which I mean that it *should*) have been rent estimated upon the ground rent that could be justly charged during that period, not taking into account the buildings. I take that to be the usual course in all such cases, when there is nothing in the terms of the original lease more special than there was in this. To take the value of the buildings into consideration in fixing the renewal rent would be making the tenant pay interest at once upon an expenditure made by himself.

Then, if I am right in this view, what the plaintiff lost by not obtaining his new lease was the value of that lease to him: that is, the value of the occupation of the premises, with the buildings as they stood, above the probable ground rent. The buildings he was to lose at any rate, for they were to be left upon the land, and as he was allowed afterwards to remove them, it would have been fair to make some deduction from the damages he should recover, on account of his having been allowed to take away the buildings. Whether the verdict should be looked upon as excessive,

supposing the damages were estimated on the principle I have stated, I cannot say. I can only say that it does not seem to me to be necessarily and obviously so.

It has been urged that the learned judge should have given some more specific directions to guide the jury in regard to the value of the lease, but I do not think there is any just ground of complaint on that head.

Supposing the jury to be men of ordinary intelligence, I think it was right and sufficient to ask them to give whatever they thought would have been the value to the plaintiff of the new lease, looking at the terms of the first lease, and at the evidence. They would in general be better judges of that than the judge himself would.—(See *Ford v. Tiley*, 6 B. & C. 329.)

I do not think that this case comes under the principle by which damages are estimated when there has been a breach of covenant for title. Such cases form an exception to the general rule, which is that where a party contracts to do something which it afterwards turns out he cannot or will not perform, the person with whom he has contracted is entitled to such damages as would place him in as good a situation as if the agreement had been fulfilled. This principle, however, is not to be carried so far as to include claims for damages arising from remote causes, which cannot fairly be supposed to have been in contemplation of the parties.

I think the rule should be discharged.

McLEAN, J.—It is not alleged in this case that there was any fraud or want of good faith on the part of the defendants in making the lease, under which the plaintiff as assignee seeks to recover damages. It is in fact admitted that the title to the market square in the town of Brantford, of which the lot leased to Henry Wade was a part, was vested in the defendants, and that the lease was made by the defendants under the belief of all parties that the defendants, as the corporation of Brantford, had the right, on behalf of the inhabitants of the town, and for their benefit, to give leases of such portions of the market reserve as were not immediately required for public purposes. The municipality for the time,



through the mayor, and under the corporate seal, executed the lease to Henry Wade, on certain terms stated in the lease, one of which was that a house not less than two stories in height, and thirty feet long, and twenty-four feet wide, should be erected on the lot within a year from the date of the lease, and that after its completion it should be kept in good and tenantable repair during the term by the lessee; the defendants at the same time covenanting on their part to grant a renewal of the lease at the expiration of the first term, for a further period of ten years, at such rent as should be established by arbitration, and with the same covenants as the former lease, except as to the further renewal.

Whether the defendants contemplated that at the expiration of the first lease they would be entitled to claim rent on the buildings erected on their land, and forming part of their freehold, for the further term agreed to be granted, is not very apparent, but the effect of the buildings being erected on their property, without any stipulation on the part of the tenants that for the further term they should only be subject to a ground rent to be ascertained by arbitration, would be to leave the buildings at the expiration of the term the absolute property of the corporation, and subject to their control to the same extent as the land on which they were built. That was the view urged by defendants' counsel, both at the assessment of damages and in the argument on moving the rule absolute for setting aside the present assessment, and I confess that I feel inclined to concur in the correctness of that view, in which case the conclusion contended for would follow, that the plaintiff could only be legally entitled to nominal damages.

But that is not the only ground on which in my judgment the plaintiff is only entitled to nominal damages in this case. The principle appears to be distinctly established, that where a vendor fails to make a good title pursuant to his contract, the purchaser, (in the absence of fraud or misrepresentation on the part of the vendor,) is not entitled to damages for the loss of his bargain. On the other hand, it seems to be equally well established that where a party is professing to sell, as in *Hopkins v. Grazebrook*, (6 B. & C. 31,) and *Robin-*

son v. Harman, (1 Ex. 850,) he may be liable for substantial damages for the loss of the bargain.

In the latter case, the defendant had agreed to grant a good and valid lease of certain premises, and when asked if he was sure that he had power to grant the lease without the concurrence of other parties, and it was suggested to him that his father's will might have vested the legal estate or the power of leasing in trustees, he replied that there was nothing of the sort; that it was his property out and out, and that he alone had the power of leasing. It appeared, however, that defendant's father had devised the premises to trustees to pay the defendant a moiety of the rent during his natural life. It was urged in that case, on the part of the defendant, that the plaintiff could not recover damages on account of the loss of his bargain, and that as the sum of £25 paid into court exceeded the expenses which the plaintiff had been put to, the defendant was entitled to the verdict. The learned judge, however, was of a different opinion, and a verdict was found for the plaintiff for £200 beyond the sum paid into court, and the verdict was afterwards sustained by the Court of Exchequer, on the ground that defendant had undertaken to grant a valid lease *not having any colour of title*, and that the case was not distinguishable from Hopkins v. Grazebrook, (6 B. & C. 31,) which proceeded *on the ground of the deception* practised by the vendor in holding out the estate as his own, when in point of fact he had not a shadow of title.

The case of Vallier v. Walsh, (6 C. P. 459,) was decided on the same ground, the defendant having contracted to sell land which belonged to his son, a minor, who was then out of the province, and therefore being fully aware that he had no title in himself, and no authority to make a contract for his son.

I apprehend that the principle is the same, that where a party professes to sell or to lease premises which he *bonâ fide* believes he has a right to sell or lease, though in fact he has no title, he is not liable to substantial damages for the loss of a bargain. In this case the plaintiff knew the title under which the defendants professed to lease. He bought with a full knowledge of facts, believing that the lease was

valid. He could have satisfied himself, before he purchased, as to the defendants' right as a corporation to make leases of property dedicated by the grant from the Crown to the uses of a public market, but appears to have taken no measures for that purpose, but relied upon those from whom he purchased, who were mistaken, as well as the defendants, with respect to the power of a corporation over such lands.

One of the grounds of damage laid by the plaintiff is that he will lose the large amount invested, and that the buildings have been greatly reduced in value, and are of little value to the plaintiff. As to such value, it is well known that wooden buildings, such as those of the plaintiff, are often removed from one piece of ground to another, without much expense or injury; and whatever the value might be the plaintiff has had the benefit of it, as the buildings have been sold on execution, and the proceeds applied to the payment of the plaintiff's debt due on such execution. The jury, in addition to the value of the buildings obtained on the execution, have allowed to the plaintiff a sum of £625 as damages for the buildings, on a plot of ground of 60 feet by 24, and loss of the lease, which defendants were unable, not unwilling, to give; and as I am of opinion that under the circumstances the plaintiff can only be entitled to nominal damages, or at most the value of his buildings, and he has already received that through the sheriff's sale on execution, I think the assessment should be set aside, and the damages reduced to nominal damages, or that the case should be sent down to another jury for the more correct assessment of the damages to which the plaintiff may be entitled.

BURNS, J., concurred with the Chief Justice.

Rule discharged, *McLean*, J., dissenting.

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## McDONALD V. MURPHY.

*Ejectment—Bond—Construction of—Unsatisfied mortgage.*

M., being the owner of the land in question, executed a bond to defendant, reciting that defendant was to reside with him and work the farm in common for their mutual advantage; that it had been agreed that after M's. death it should become defendant's, and to secure this, M. had that day made his will leaving it to him;—and the condition was, that if defendant should use all diligence and economy in working and improving the farm, and observe all esteem and regard to M. during his life, M. should not execute any other will, nor dispose of nor encumber the land. Afterwards they disagreed, and M. conveyed the land to the plaintiff, who brought ejectment, after having demanded possession.

*Held*, that he was entitled to recover, as the bond gave defendant no legal right to possession.

*Held*, also that an unsatisfied mortgage executed by M. before the bond, and put in by defendant, was clearly no bar to the plaintiff's recovery.

EJECTMENT, for the east half of the east half of lot No. 9, in the first concession of the township of Charlottenburgh.

Both parties claimed from Angus McDonald, the plaintiff's father.

The plaintiff claimed by virtue of a deed of bargain and sale, dated the 15th of September, 1860, executed by Angus McDonald and the plaintiff, for a consideration expressed in the deed of £300, though nothing in fact was paid.

The defendant was a nephew of the said Angus McDonald, and in 1858 they made an arrangement with each other in respect of the west half of the east half of the lot, by which it was transferred by Angus McDonald to the defendant, and they also made an agreement in respect of the east-half, of which the following is a copy.

“Know all men by these presents, that I, Angus McDonald, of the township of Charlottenburg, in the county of Glengarry, in the province of Canada West, yeoman, am held and firmly bound unto Matthew Murphy, of the township of Finch, in the county of Stormont, of said province, yeoman, in the sum of £800, to be paid to the said Matthew Murphy, his heirs, executors, or administrators, for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated at Charlottenburgh aforesaid, this 26th of October, 1858.

“Whereas the above bounden Angus McDonald, hath this day assigned and transferred over to his nephew, Matthew Murphy, the west half of the east half of lot No. 9, in the

first concession of the township of Charlottenburgh, for the consideration therein mentioned, and also that the said Matthew Murphy will reside with the said Angus McDonald, and to work the said east half of lot No. 9 together, in common, for their united support, benefit and advantage. And whereas, it was further agreed upon, that after the decease of the said Angus McDonald, the whole of the said east half of lot No. 9, should then become the sole property of him, the said Matthew Murphy, his heirs and assigns for ever, and for the better securing an indisputable title to the said Matthew Murphy, he, the said Angus McDonald, hath with even date with these presents, made and executed his last will and testament, whereby he bequeathed the east half of the east half of lot No. 9, in the first concession of the said township of Charlottenburg, that after his death the said lot would become the sole property of him, the said Matthew Murphy, his heirs and assigns for ever, except such a portion that hath been leased, and at the expiration of said lease the same shall revert to the said Matthew Murphy, his heirs and assigns for ever. Now the condition of the above obligation is such, that the said Matthew Murphy, his heirs, executors, and administrators, using all diligence and economy in working and improving the said farm, and observing all esteem and regard towards the said Angus McDonald during his natural life, then the said Angus McDonald, do hereby bind himself, his heirs, executors, and administrators, that he shall not make or execute any subsequent will and testament to the one referred to, to interfere with the bequest therein mentioned, nor in any manner dispose of, nor alienate or encumber the said east half of the east half of lot No. 9, in the first concession of the said township of Charlottenburgh, so that the same may become the sole property of him, the said Matthew Murphy, his heirs and assigns for ever, after the decease of the said Angus McDonald, then this obligation to be null and void, otherwise to remain in full force, virtue, and effect."

The parties went on together under this arrangement for some time, until they disagreed, and then Angus McDonald conveyed the land to the plaintiff, his son, who demanded possession from the defendant. The defendant refused to give up the land, but claimed a right to it under the bond. He put in also an outstanding mortgage, dated the 22nd of January, 1857, executed by Angus McDonald, to shew that the plaintiff was not entitled to possession.

The case was tried at Cornwall, before *Robinson, C. J.*,

and a verdict entered for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit if the action could not be sustained.

*J. S. Macdonald*, Q. C., obtained a rule to enter a nonsuit, or for a new trial, on the ground that the terms of the bond precluded the plaintiff from maintaining ejectment, even though he had demanded possession. He cited *Arnold v. Buller and Smith*, 15 U. C. R. 255.

*McMichael* shewed cause, and cited *Doe Boulton v. Walker*, 8 U. C. R. 571.

McLEAN, J.—There can be no doubt, according to the terms of the bond, that Angus McDonald after the execution of that instrument continued to be the owner in fee of the premises sought to be recovered in this suit. He had transferred absolutely to the defendant the west half of the lot, and made a will devising the east half to him, upon the understanding, apparently, that the defendant was to remain on the farm and assist in working the whole for the support and advantage of the plaintiff as well as of the defendant, as long as the plaintiff should live. The bond appears to have been given for the sole purpose of guarding against the obligor changing his mind, and devising the land to some other person, or disposing of it in some other way, so that the defendant could not “become the sole owner of the whole farm,” on the death of Angus McDonald. Though the intention is plain enough, that the parties had it in contemplation that the defendant was to reside on the lot with Angus McDonald, and to support him, and upon the death of McDonald to take the residue of the lot for such service, there is no obligation resting on McDonald to allow the defendant to remain on the premises with him. The arrangement between them only appears by the recitals, and Angus McDonald only binds himself “that the defendant, Matthew Murphy, *using all diligence and economy in working and improving the said farm, and observing all esteem and regard towards the said Angus McDonald during his natural life, then,*” he, Angus McDonald, will not make or execute



any subsequent will to interfere with the *bequest* therein mentioned, nor in any manner dispose of or alienate or encumber the premises, so that the same may become the sole property of the said Matthew Murphy after the decease of the said Angus McDonald.

Neither the defendant nor Angus McDonald contemplated that the defendant was to have any interest in the land till after the death of McDonald, and then his title was to be derived from the will which had been executed; but the obligation to continue that will unaltered or unrevoked would seem to depend upon certain conditions precedent, that the defendant should use all diligence and economy in working and improving the farm, and that he should observe all esteem and regard towards Angus McDonald during his natural life. Whether these conditions were or were not performed by the defendant from the time of the arrangement is not material to enquire. It is quite clear that, according to the defendant's admission, Angus McDonald had a good title to the part of the farm now in dispute, and that the bond confers on the defendant no right whatever to remain in possession longer than McDonald thought proper to allow him for the purpose of working it in common for their mutual support. The title to the plaintiff is so plain that there can be no doubt of his right to recover in this action.

Then as to the unsatisfied mortgage, that surely cannot be allowed to bar the plaintiff's recovery, for it was admitted at the opening of the case that Angus McDonald had a good title, and besides, the defendant had himself taken a deed from him of a date subsequent to the mortgage, and claimed to hold possession under him in this action.

BURNS, J.—The defendant relies upon the case of *Arnold v. Buller and Smith*, (15 U. C. R. 255,) but the present case is quite distinguishable from that. There the effect of the bond was to create an equitable mortgage in favour of the husband, with an estate for life to the wife, whether the husband redeemed or not, and the court held that the heir of the husband so long as the wife lived could not maintain ejectment. The terms of the bond in that case were, that

upon payment of the stipulated sum the obligor would reconvey the land to the wife, and that she was to have possession of it for her life, whether the money were repaid or not.

Now in the present case no legal interest has been given to the defendant in the land in question by the bond to Angus McDonald. The agreement as recited is, that the defendant should reside with Angus McDonald, and should work the land in question in common, for the mutual support, benefit and advantage of both, and not specifying any time, but that after the decease of Angus McDonald the land should become the sole property of the defendant; and for the purpose of giving him an indisputable title Angus McDonald made his will, devising the land to the defendant. The condition of the bond is, that if the defendant uses all diligence and economy in working and improving the farm, and observes all esteem and regard towards Angus McDonald during his natural life, then Angus McDonald covenants not to revoke his will, or dispose of the property. It is apparent that Angus McDonald did not part with the legal title in the land, but retained a control over it, and the only question with respect to that is, whether by his deed to the plaintiff he has forfeited the bond; and that depends upon another question, whether the defendant has kept the stipulations upon which Angus McDonald bound himself not to dispose of the land.

The question at present, however, is whether any tenancy was created as between Angus McDonald and the defendant, which could not be determined by a demand of possession. The stipulation in the bond is not for the exclusive working of the land by the defendant, but it is that the defendant and Angus McDonald were to do it together for their mutual support. No time is limited for which this should continue. Angus McDonald terminated the agreement on his part by his conveyance of the land to the plaintiff, and there is nothing to shew that the defendant would be entitled to go on working the land by himself during the lifetime of Angus McDonald, and still less any thing to prove that it was the intention of the parties that the vendee of Angus McDonald should continue with the defendant upon the same terms.

Whether the mere fact of Angus McDonald conveying to the plaintiff put an end to the tenancy at will, such as it was, it is not necessary to say, because the possession was demanded by the plaintiff after he received the conveyance, and the defendant refused to give possession.

The rule must therefore be discharged.

ROBINSON, C. J., concurred.

Rule discharged.

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### HECK V. KNAPP.

*Trespass to land—Possession—Prior ejectment—Estoppel.*

In an action for trespass to land the plaintiff proved a good paper title derived through a sale for taxes, but he had never been in actual possession, and it was shewn that after the plaintiff obtained his deed the defendant had cut timber on the land and built a shanty for the lumber-men, although the plaintiff went there and forbade him; and it appeared that the plaintiff had brought ejectment against him, but had not proceeded with it after defendant appeared. The defendant claimed under a deed from the heirs of the patentee, and it was sworn that before defendant purchased the plaintiff also wished to buy from them, saying that he thought his own title not good.

*Held*, that the plaintiff was sufficiently in possession to maintain trespass, and that he was not estopped by having brought ejectment, as being an admission of defendant's possession.

TRESPASS, for cutting and taking away timber from certain land of the plaintiff, called or known as eighty acres of the front of lot No. 3, in the 8th concession of the township of Augusta, describing it.

*Pleas*.—1. Not guilty. 2. That the land mentioned is not nor is any part of it the plaintiff's land as alleged.

At the trial, at Brockville, before *Robinson*, C. J., it appeared that the whole of lot No. 3, in the 8th concession of Augusta, was described in the year 1800 for patent to Nicholas Haskins, but the patent did not issue till the 29th of October, 1845, when it then issued to Joseph Haskins, son and heir at law of Nicholas Haskins. The lot had been returned years before that time as in arrear for taxes, and eighty acres of it were sold by the sheriff, and he conveyed those eighty acres to Angus McDonell, the purchaser, by a deed dated the 10th of January, 1832, which deed was registered on the 21st of April, 1832. Angus McDonell,



by deed of conveyance dated the 1st of October, 1840, conveyed the eighty acres to one Isabella McDonell, and Isabella McDonell, by deed dated the 26th of January, 1857, conveyed the eighty acres to the plaintiff. In 1845 a survey was made, and a line marked to distinguish those eighty acres from the other part of the lot. This formed the plaintiff's title to the land.

It was clearly enough established that the defendant had cut timber and taken it away from the eighty acres since the 26th of January, 1857, the date of the plaintiff's conveyance, and built a shanty for lumber-men upon the land. The plaintiff forbade the defendant trespassing upon the land, and on one occasion went to the land with assistance to haul away the timber he found cut there, but the defendant's men threatened to shoot the plaintiff, and so he desisted.

The defendant's defence was that the plaintiff was not in a situation to bring trespass, for that he never had had possession of the land in any way; that his proper action was ejectment, in order to establish his right to possession first of all, and that defendant was not liable in this action.

Joseph Haskins, the patentee, died without sons, leaving three daughters, namely, Elizabeth, who was married to one Samuel Pearson, Pauline Ann, who married one Thomas Davis, and Rebecca Ruth Haskins. The three daughters, with the husbands of the two, joined in a conveyance, dated the 18th of April, 1855, of the whole lot, to the defendant, on which was endorsed the proper certificate of the married women having parted with their real estate in the land. It was then proved that after the plaintiff got his title from Isabella McDonell, and not long after, he brought an action of ejectment against the defendant for the eighty acres, to which the defendant entered an appearance, and the action so remained, never having been proceeded with. The defendant was in no other way possessed of the land than by cutting off the timber during several successive winters, when he erected a shanty upon the eighty acres for his workmen to shelter themselves in, and he was well aware of the plaintiff's claim to the lot in the winter of 1857-8, before he removed the timber then cut.

Thomas Davis, husband of one of the daughters of the patentee, stated that about the time the defendant bought the eighty acres the plaintiff wanted to buy from him the lot, stating that he had bargained with Mrs. McDonell for the eighty acres, but he considered she had no title to it, and that he thought the patent from the Crown would hold it.

The learned Chief Justice directed a verdict for the plaintiff, but reserved leave to the defendant to move to enter a nonsuit on the evidence, if the court should be of opinion that an action of trespass could not be maintained.

The jury gave \$10 damages.

*A. Richards* obtained a rule *nisi* to enter a nonsuit upon the following grounds:

1. That the plaintiff having brought an action of ejectment against the defendant, to recover possession of the land upon which the alleged trespass was committed, before the committing of the same, which action is still pending, cannot be considered as in possession of the premises so as to maintain trespass.

2. That the defendant having been in actual possession of the premises at the time the plaintiff brought the same, and continued in possession from thence up to the commencement of this suit, the plaintiff was not in possession thereof at the committing of the alleged trespasses, and therefore could not maintain this action.

3. That the plaintiff, at the time of the committing of the alleged trespasses, had not such a possession of the premises as would enable him to maintain trespass.

4. That the plaintiff was estopped from setting up title to or possession of the premises, inasmuch as he represented to the defendant at the time he, the defendant, purchased, that the title which he, the plaintiff, claimed was not good, and upon the faith of which the defendant purchased.

He cited *Street v. Crooks et al.*, 6 C. P., 124; *Roys v. Cramer*, 12 U. C. R. 165; *Church v. Foulds*, 9 U. C. R. 393; *Turner v. Cameron's Coalbrook Steam Coal Co.*, 5 Ex. 932; *Litchfield v. Ready*, *Ib.* 939; *Davison v. Wilson*, 11 Q. B. 890; *Addison on Torts* 172, 399; *Cole on Ejectment*, 66-71; *Co. Lit.* 368, 245 *b*.

*Crombie* shewed cause, and cited *Hey v. Moorhouse*, 6 Bing. N. C. 52; *Butcher v. Butcher*, 7 B. & C. 399; *Taunton v. Costar*, 7 T. R. 432; *Purnell v. Young*, 3 M. & W. 288; *Whittington v. Boxall*, 5 Q. B. 139; *Harrison v. Dixon*, 12 M. & W. 142; *Gallagher v. Brown*, 3 U. C. R. 350; *Reading v. Rawsterne, Ltd.* Raym. 829.

McLEAN, J.—There seems to me to be ample evidence of the sufficiency of the plaintiff's title to the premises on which the trespass was committed, for though the patent was issued only in 1845, and the title was in the Crown at the time of the sale for taxes in 1830, the lot appears to have been returned in the schedule of granted and leased lands required to be made by the act, 59 Geo. III., ch. 7, sec. 12, and being so returned, it became liable to be assessed, and in default of payment for eight years it became liable, under the act 6 Geo. IV., ch. 7, to be sold for the taxes in arrear for a period of eight years.

The title from the purchaser for taxes at the sale in 1830 down to the plaintiff is sufficiently established, and the only question appears now to be, whether the plaintiff was in possession so as to enable him to maintain trespass. The fact of the boundaries of the eighty acres in dispute having been run in 1845 by the owner at that time, was an act of ownership, which could not be unknown to the parties claiming the other portions of the lot; and when the defendant became the purchaser, in April, 1855, ten years after the lines were marked out on the ground, he could scarcely have avoided seeing them. The plaintiff was on the lot subsequently, and forbade the defendant and his men trespassing on the eighty acres, and though defendant and his men persisted in their trespass, and added to its aggravation by threatening to use a gun if he did not leave the premises, that could not deprive the plaintiff of the right which he had acquired, nor could it give to the defendant a right of possession to the exclusion of the plaintiff longer than he himself remained on the land. The cutting timber by the defendant, and taking it away, after being warned by the



plaintiff on the land not to do so, was in itself an act of trespass on his part, for which the plaintiff could have maintained an action against him.

I am, under the circumstances, of opinion that this action is well brought, and that the rule must be discharged.

As to the former action of ejectment, the plaintiff may at the time have considered defendant in possession, but his subsequent entry on the premises when they were wholly unoccupied, and no one on the premises to contest his right, would draw the possession to him as the rightful proprietor, and enable him to bring trespass against any one who subsequently entered without right and trespassed on the land. The defendant claimed to be in possession of the lot because he had a deed from the heirs of Haskins, and had been on the lot, and cut timber on it. The plaintiff claimed the eighty acres by a superior title to that derived from Haskins, and he claimed the possession under that title and his entry on the premises, and he had a right to treat the acts of defendant, as they really were, as acts of trespass, though no doubt intended by defendant to be acts of ownership.

BURNS, J.—There is no doubt that in trespass, it being a possessory action, the plaintiff must prove himself to have the possession of the land: that is, he must be either in actual possession, or constructively so. Now the land in this case being a wild lot, and no one in possession living upon or cultivating it, the plaintiff would, if there were nothing else shewn than the conveyances under which he claims, be held to be constructively in possession of the eighty acres in question. The defendant also shews a conveyance from the heirs of the patentee of the lot, which covers those eighty acres, and if the plaintiff's conveyances were out of the way the same rule would apply to him. Notwithstanding the patent did not issue until 1845, yet the legal title passed under the sale for the arrears of taxes, and we cannot have the constructive possession in two persons at the same time, claiming adversely to each other, and therefore the constructive possession in law must follow the legal title.

If the plaintiff, on the 26th of January, 1857, when he

obtained his conveyance from Mrs. McDonell, would in law be considered to be in constructive possession of the land in question, the next enquiry is whether there existed any thing which disturbed that possession, or would destroy the effect of it. It seems that defendant was trespassing upon the land then, or very soon afterwards. Suppose we give him credit for thinking that under his conveyance from the co-heiresses of the patentee he would have a right to the whole of the lot, yet that did not render him less a trespasser upon the rights of the plaintiff. If the defendant had either himself gone to live upon the land, or put a tenant upon it, so that it could be said that the plaintiff was dispossessed, and that his constructive possession had ceased, then the case would have been different, but for all that is disclosed here the defendant was nothing than an occasional trespasser himself upon the land, and that never can be allowed to operate to dispossess the true owner. Besides this, it appears that the plaintiff did enter upon the land, not only for the purpose of forbidding the defendant from further trespassing, but also to assert his own rights both as to the land and the timber then cut, and that act has relation back to the time of the accruing of his own title.—*Barnett v. The Earl of Guildford*, (11 Ex. 19.) Otherwise it might happen that the freehold itself might be destroyed, and the owner be without remedy.

The only question is the one relied upon by the defendant; that is, whether the plaintiff is to be held to have excluded himself from that position by having brought an action of ejectment against the defendant, and which suit he did not proceed with. No doubt, whoever the plaintiff in ejectment names as defendant in the writ of summons, he thereby admits him to have the possession of the land, but then that is for the purposes of that suit. The plaintiff may find out his mistake and consequently drop the suit. He might have tried his title in the ejectment suit if he had pleased to have done so, but that does not prove that he may not also do the same thing in an action of trespass. We see the facts of the case now, and there is nothing in those facts to prevent the plaintiff from bringing his action of trespass. His having

thought at one time that it might be better to bring an action of ejectment is nothing upon which the defendant acted or conducted himself in the matter, and the plaintiff does not preclude himself from saying in an action of trespass that he had such a possession as enabled him to maintain trespass, because he had also brought an ejectment. If the defendant had fully believed that the plaintiff was thereby estopped, he might have pleaded it by way of estoppel.

I think the rule should be discharged.

See *Taunton v. Costar*, (7 T. R. 431,) *Butcher v. Butcher*, (7 B. & C. 399.)

ROBINSON, C. J., concurred.

Rule discharged.

# ROBERT HERVEY AND HENRY HOOKER V. JACQUES.

*Promissory note payable in L. C.—12 Vic., ch. 22—Construction of—Limitation of action.*

To an action on a note made by defendant, payable to A. H., and by him endorsed to the plaintiffs, defendant pleaded that it was made in Lower Canada, where he resided, payable in Montreal, and that the suit was not brought within five years after it fell due. The plaintiffs replied, that when the note was made and endorsed to them, A. H. lived in Upper Canada, and at the time of said endorsement one plaintiff lived in Upper Canada and the other in the United States. Defendant rejoined that after the note fell due, while A. H. held it, and more than five years before suit, A. H. carried on business in Lower Canada, that he and defendant met at Montreal, and A. H. might then have sued him.

*Held*, on demurrer to the rejoinder, that by the 12 Vic., ch. 22, the note, owing to the lapse of time, must be taken to be absolutely paid and discharged; and that the plaintiffs could not recover.

DECLARATION, on two promissory notes, dated the 11th of January, 1854, made by defendant, payable to one Alfred Hooker, or order, and by him endorsed to the plaintiffs—one for £1055 11s. 1d., payable nine months after date, the other for £1055, payable twelve months after date. The writ of summons issued on the 18th September, 1860.

*Plea*.—That the said notes were, and each of them was made out of the province of Upper Canada, and the jurisdiction of this honourable court, to wit, at the city of Montreal, in that part of the province of Canada formerly called Lower Canada, and after the passing and coming into force of the 12 Vic., ch. 22, by which said act, and the law of Lower



Canada aforesaid, it is provided and declared that all bills, whether foreign or inland, and all notes due and payable in Lower Canada, made after the said act should come into force, should be held and taken to be absolutely paid and discharged, if no suit or action should be brought thereon within five years next after the day on which said bills or notes should become due and payable. And the defendant avers that the said notes were, and each of them was, made payable on the face thereof, and was part of the contract of the defendant, at the Commercial Bank of the Midland district, in the city of Montreal, in the said province of Lower Canada, and that the said notes and each of them became due and payable in Lower Canada aforesaid more than five years next before the commencement of this suit. And the defendant further says that at the time the said notes became due and payable he, the defendant, was a resident of Lower Canada, and hath ever since been and is now a resident of Lower Canada: that this suit has been commenced by a writ of summons issued against him as a British subject resident out of the jurisdiction of this honourable court, with which said summons he was served out of the jurisdiction of this honourable court, to wit, at the city of Montreal aforesaid. And the defendant further avers, that this suit was not brought within five years next after the day on which the said notes, or either of them, became due and payable; by reason whereof, and by the law of Lower Canada aforesaid, the said notes became and were, and each of them was absolutely paid and discharged.

*Replication.*—That at the time of the making of the said notes respectively, and from thence until the endorsement of the same respectively to the plaintiffs, the said Alfred Hooker was a British subject in Upper Canada, and that at the time of said endorsement of the same respectively to the plaintiffs, and from thence hitherto, the plaintiff Robert Hervey was and is a British subject resident in Upper Canada, and the plaintiff Henry Hooker was and is an American citizen, resident in the State of New York, one of the United States of America. And the plaintiffs further say, that the said notes have not, nor have either of them,

or any part thereof, been at any time in fact paid or discharged, but that the same, and each and every of them, and every part thereof, remain still wholly due and unpaid and discharged.

*Rejoinder.*—That after the said notes respectively became due, and whilst the said Alfred Hooker was the holder thereof, and more than five years next before the commencement of this suit, the said Alfred Hooker carried on business as a forwarder in Lower Canada aforesaid; and he and the defendant, after the said note became due, and more than five years next before the commencement of this suit, met together in Lower Canada, to wit, at the city of Montreal aforesaid, and the said Alfred Hooker might then have brought his action on the said notes against the said defendant. And the defendant further says, that the plaintiffs first took and received the said notes from the said Alfred Hooker after he and the said defendant had met together in Montreal as aforesaid, and long after the said notes became due, and that by the law of Lower Canada aforesaid the said notes, by reason of the premises aforesaid, and in the defendant's said third plea mentioned, became absolutely discharged and satisfied, and not merely the remedy for the recovery thereof barred.

*Demurrer* to this rejoinder, on the ground that under the facts alleged the law of Lower Canada is not applicable to the plaintiffs' claim so as to bar the recovery thereof.

*Crombie*, for the demurrer, cited *Ridout v. Manning*, 7 U. C. R. 35; *Huber v. Steiner*, 2 Bing. N. C. 202; *Donn v. Lippmann*, 5 Cl. & Fin. 1; *British Linen Co. v. Drummond*, 10 B. & C. 908; *Stor. Confl. L.* 487; *Westlake*, 151.

*M. C. Cameron*, contra, cited *Potter v. Brown*, 5 East 130.

ROBINSON, C. J., delivered the judgment of the court.

The question brought up by this demurrer arises upon two promissory notes made in Lower Canada, after the 1st of August, 1849, when the statute 12 Vic., ch. 22, came into force, namely, on the 11th of January, 1854, and made by this defendant, who at that time, and when the notes became

due, resided, and has always since resided, in Lower Canada, payable to one Alfred Hooker, or order, at the Commercial Bank of the Midland district, in the city of Montreal, in Lower Canada.

It is admitted upon the pleadings that Alfred Hooker, when the notes were made payable to him, was a British subject in Upper Canada, and so continued until the notes were endorsed by him to these plaintiffs, one of whom, Robert Hervey, at the time of such endorsement, and until the commencement of this action, was a British subject resident in Upper Canada, and the other plaintiff, Henry Hooker, was and is an American citizen, resident in the State of New York. And it is further admitted on the pleadings, (*i.e.*, by the plaintiffs' demurrer to the defendant's rejoinder) that after the notes became due, and while the payee, Alfred Hooker, was the holder, and more than five years before the commencement of this suit, he carried on business as a forwarder in Lower Canada, and that he and the defendant, Jacques, after the notes became due, and more than five years before this suit, met together in Montreal, in Lower Canada; that he, Alfred Hooker, might then have sued this defendant upon the notes, and that these plaintiffs first received the notes from the said Alfred Hooker after he and the defendant had so met together in Montreal, and long after they became due.

What we are called upon to decide, upon this state of facts, is whether by our statute 12 Vic., ch. 22, sec. 31, we must hold that these notes are to be taken to have been absolutely paid and discharged before the commencement of this action on the 18th of September, 1860.

The 31st clause is in these words: "And be it enacted, that all bills, whether foreign or inland, and all notes, due and payable in Lower Canada at the time when this act shall come into force, shall be held and taken to be absolutely paid and discharged, if no suit or action is brought thereon within five years next after the day on which such bills or notes shall become due and payable, and all such bills and notes made and not due when or to be made after this act shall come into force, shall be held and taken to be absolutely



paid and discharged if no such suit or action is brought thereon within five years next after the day on which such bills or notes shall become due and payable."

It is plainly the intention of this act that when the action is not brought within the time limited its effect shall be not merely to bar the remedy in the courts of Lower Canada, or elsewhere within the territory for which the parliament which passed it has authority to legislate, but that the cause of action which had been created by it shall be held to be absolutely extinguished. The note itself "*shall be held and taken to be absolutely paid and discharged.*"

As to all persons domiciled in Canada, either Upper or Lower, it is not the statute law of a foreign country that we have in this case to apply, but a statute of our own country, as binding upon the people of the Upper portion of the province as of the Lower. We are not asked to admit its operation merely upon the ground of comity of one independent nation or people towards another, but the statute in itself is a direct binding obligation upon us, and upon all persons for whom the legislature of Canada has authority to make laws.

We have also here to deal with a contract made in Lower Canada, and to be performed therein, and if according to the act of the legislature, whose laws are capable of binding both the people and contracts of Upper Canada, the notes now sued upon must be held to be absolutely paid and discharged, we know of no principle upon which we can enforce them in the face of such an enactment, which goes not merely to bar the remedy, but to discharge the very contract itself. We have these circumstances concurring, that by the words of the statute binding upon us a contract made in Lower Canada, and to be performed there, is declared to be in effect discharged under such facts occurring as are stated to have occurred in this case. The party, besides, who made the contract, and is sued upon it, and who on the general principles of law the debt is held to follow, has been always since resident in Lower Canada.

Of the two plaintiffs it is true one has been all the time resident in Upper Canada since the notes were endorsed to

the plaintiffs, and the other has been all the time and now is resident in the United States of America, but that cannot, we think, affect the question, any more than if the objection to the recovery upon the notes had been that they were made void by the law of Lower Canada in the hands of a *bonâ fide* holder for any other cause.

It is true that in *Ridout et al. v. Manning et al.*, (7 U. C. R. 35,) we held that the statute 12 Vic., ch. 22, was obviously intended to apply to Lower Canada only, which construction, we think, has been confirmed by the legislature, but the only effect of that decision is that a note made in Upper Canada, and payable here, cannot by that act be held to be discharged if not sued upon within five years.

We purposely abstain from going into any statement of the points decided in the cases cited, for we think they cannot govern this question. We mean the cases of *Potter v. Brown*, (5 East 124,) *Huber v. Steiner*, (2 Bing. N. C. 202,) *The British Linen Company v. Drummond*, (10 B. & C. 903,) and *Leroux v. Brown*, (12 C. B. 801.) If the circumstance that one of the plaintiffs suing as endorsers is a citizen of a foreign country, the United States of America, and so not directly bound by the acts of the legislature of Canada, could make any difference, which we think it could not, yet that could not lead to the case being otherwise disposed of than it would be if the other plaintiff were suing alone, since one alone of the two plaintiffs could not recover.

The defendant is in our opinion entitled to our judgment.

Judgment for defendant on demurrer.

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WILLIAM DARLING, EXECUTOR OF DAVID DARLING, v.  
ALLAN NEIL McLEAN.

*Principal and surety—Discharge by giving time—Equitable plea—Power of attorney—Authority of agent—Assent of principal.*

*Declaration*, that defendant assigned to the plaintiff a mortgage executed to defendant by one W., and by the deed of assignment covenanted that W. should pay the principal and interest when due, and that upon default made by W. defendant would pay the same: that W. made default, but defendant did not pay.

*Plea*, on equitable grounds, that defendant covenanted as surety only for W.: that the plaintiff when he took the deed knew him to be so, and accepted him as such; and that the plaintiff afterwards, without defendant's knowledge or consent, and for good and sufficient consideration in that behalf, agreed with W. to give, and did give him time for payment of the principal and interest secured by said mortgage beyond the time when it fell due.

*Held*, on demurrer a good plea: that the declaration clearly shewed defendant to be only surety: that the consideration was sufficiently stated: that the agreement might be by parol; and that it was not necessary to shew that defendant was prejudiced by the giving time.

At the trial it appeared that the assignment containing the covenant sued on had been executed by one C. as attorney for defendant, during his absence from the country, under a power which authorised him only to collect debts and to execute all such deeds and perform all such acts as might be considered necessary and proper concerning the business of defendant; but it was proved that defendant before leaving agreed to give this covenant, and told the attorney of it, in consequence of which the latter executed the deed, and received the money. *Held*, that under these circumstances the authority was sufficient, and defendant could not refuse to be bound by the covenant.

As to the giving time, it was shewn that when the mortgage fell due the plaintiff told W., the mortgagor, that he would wait on his paying 12 per cent. No time was settled, but W. signed two notes for £24 each, for one year's interest, which he paid, and afterwards two others, on which the plaintiff had sued and obtained judgment. Nothing was said about defendant's liability when this arrangement was made, and defendant was not aware of it until long after. The court being left to draw the same inferences as a jury:

*Held*, that the equitable plea was proved, and defendant discharged.

DECLARATION, that the defendant by deed did bargain, sell, and assign, &c., unto David Darling, the testator, his heirs, executors, administrators and assigns, as well a certain indenture of mortgage made by one James Wallace, and dated the 1st of July, 1855, for securing the payment of the sum of £400, three years from the date thereof, with interest thereon half yearly, as also the lands and premises in the said indenture of mortgage contained, and the principal money and interest thereby secured; and the defendant did thereby covenant, promise, and agree to and with the said David Darling, his executors and administrators, that



the said James Wallace should well and truly pay to the said David Darling, his executors or administrators, the said principal sum of £400 and interest when and as the same should become due, and that upon default made by the said James Wallace in such true and punctual payment, he, the said defendant, would well and truly pay and discharge the said sum of money and interest. And the plaintiff averred that although the time for payment of the said principal sum, according to the said mortgage, had elapsed before the commencement of this suit, and although the said James Wallace had made default in payment of the said principal sum of £400, and interest thereon as aforesaid, from the 1st of July, 1859, and the same was still in arrear and unpaid, yet the defendant had not paid the same, or any part thereof, either to the said David Darling in his lifetime, or to the plaintiff, as such executor as aforesaid, since the death of the said David Darling.

*Plea*, on equitable grounds, that the defendant did by the said deed in the declaration mentioned covenant as in the declaration is alleged as the surety only of the said James Wallace, to secure to the said David Darling the principal money and interest mentioned in the said indenture of mortgage in the declaration mentioned, and by the said deed of the defendant assigned to the said David Darling, as in the declaration alleged; and when the said deed was made and delivered by the defendant to the said David Darling, it was so executed and delivered by the said defendant as such surety only, and the said David Darling then knew that he, the defendant, was only surety as aforesaid for the said James Wallace, and then accepted him as such surety; and the said William Darling did afterwards, without the consent or knowledge of the defendant, and for good and sufficient consideration in that behalf, agree with the said James Wallace to give him, and then accordingly gave him, time for the payment of the said money and interest secured by the said indenture of mortgage, and by the said deed of defendant as such surety as aforesaid, beyond the time when the same was due and payable; whereby and by reason whereof the defendant has been and is released and dis-

charged from all liability to pay the said money and interest so secured as aforesaid, or any part thereof, to the plaintiff.

*Demurrer*, on the grounds that it is not stated in nor does it appear from said plea what the consideration for the alleged agreement to give time was: that it does not appear that the said alleged agreement was under seal, or even in writing, and that according to the rules of pleading such supposed agreement, being relied upon in a plea, must, in the absence of any allegation to the contrary, be held to have been merely by parol, which is not sufficient to control and alter an instrument under seal, and is void as an agreement to give time in such a case, and would have been no answer to an action of covenant against the said James Wallace at any time after the said mortgage matured: that it sufficiently appears from the declaration that the said covenant of the defendant was not entered into by him as surety for the said James Wallace, but as principal: that it does not appear in or by the said equitable plea how the defendant was in any way prejudiced by the alleged giving of time.

The plaintiff, in addition to the plea demurred to, pleaded *non est factum*, and besides demurring to the plea before set out, he replied, 1. Denying the alleged agreement with Wallace to give time; 2. That defendant entered into the covenant as principal, not as surety. 3. That after the supposed giving of time defendant ratified the agreement and applied for further time.

At the trial at Toronto, before *McLean*, J., it appeared that the defendant sold a lot of land to one James Wallace, and took from him the mortgage mentioned, dated the 1st of July, 1855, to secure £400 of the purchase money. The money was payable in three years from the date, with interest half yearly.

The testator paid £352 for the mortgage. The solicitor who negotiated the purchase of the mortgage from David Darling as an investment, swore upon the trial of this case that he would not have made the purchase if the defendant had not consented to covenant that the mortgage debt should be punctually paid by Wallace; that the defendant, who was then about to leave Canada for England, agreed so to

covenant, and told him that he would give a power of attorney to Mr. Hector Cameron, his agent, that would enable him to carry out the terms agreed upon. Some time after defendant had gone the assignment was executed by Mr. Hector Cameron in the name of the defendant, and the purchase money was paid by Darling's solicitor into his hands.

The power of attorney was produced. It was dated the 25th of August, 1855, and gave general authority to the attorney to collect debts and give receipts, and to commence such actions for the recovery of debts as he should think expedient, "And generally to sign, seal, and execute all such deeds, conveyances, assurances, papers, documents, and writings, and to make, do, perform and transact all such acts, matters and things whatsoever, as may be considered necessary or proper touching, relating to, or concerning the business and affairs of the said A. N. McLean, in all respects, and to all intents and purposes whatsoever, as effectually as he, the said A. N. McLean, could do the same if he were personally present;" and it concluded thus, "and all and whatsoever my said attorney shall lawfully do or cause to be done in the premises by virtue hereof, I, the said A. N. McLean, hereby agree to ratify and confirm."

Mr. Cameron swore upon the trial that this power he thought was given to him as a general authority to act for the plaintiff, rather than with any special view to this transaction, but that the defendant had spoken to him of this matter before he left, stating what he had agreed to do; and that he, the witness, would not have executed the assignment, containing such a covenant as it did, if he had not been expressly instructed as he was to do so.

James Wallace was called by defendant to prove his equitable plea, and he stated that after the assignment of his mortgage he paid this plaintiff the interest accruing upon it for some time; and afterwards, either shortly before or after the time for paying the debt, he asked the plaintiff whether he should require payment of the principal punctually at the day: that the plaintiff said it would not be necessary, provided he would pay the proper value for the money, which was coming to the



estate of his brother (the testator :) that some time after he informed the witness that if he would consent to pay 12 per cent. interest, he would agree to let the money lie over for a length of time, not saying how long : that he, the witness, accepted those terms : that two notes were sent to him by the plaintiff to sign, one dated the 1st of July, 1858, and one 1st of January, 1859, each being for £24, and payable in six months, to cover interest at 12 per cent. on the £400, for the year 1858 : that he signed the notes and sent them to the plaintiff, and paid them at maturity : that he had searched for the notes, but could not find them. He stated further that the plaintiff afterwards sent up two other notes, dated 1st of July, 1859, and 1st of January, 1860, each for £24, to cover the interest at 12 per cent. up to the 1st of July, 1860 : that he had had not paid these notes, and had been sued upon them, and the plaintiff had recovered judgment for them, which was still in force, and had been registered so as to bind his, the witness', lands : that the plaintiff had also sued him in the defendant's name on the mortgage, and had recovered judgment.

He swore that nothing was said about this defendant's liability for the debt at the time he made the arrangement for time with the plaintiff, and that he was not aware that defendant had made himself liable for it. He stated that if the plaintiff had insisted on the debt being paid by him when it fell due, he could have paid it, being then more able to do so than at present, in consequence of the fall in the value of real property ; and that he had paid the plaintiff all the interest up to the time it became due. He had never told the defendant, he said, of time having been given to him by the plaintiff before October last, when he heard that defendant had been sued. He repeated that no certain period was fixed between him and the plaintiff for paying the debt, but only that the plaintiff would wait if the witness would pay 12 per cent. interest, as he did.

The defendant was called as a witness by the plaintiff, and he stated in effect that he had consented to engage for the payment by Wallace, but had forgotten it till he was pressed for payment by the plaintiff, and then Wallace offered to

give additional security, or to let the lot be sold to pay the debt. Wallace stated to him that the plaintiff had waited two years, but said nothing about its being upon certain terms, or his having given notes for additional interest. This was first told him in October last. He swore that any offers of his to the plaintiff's attorney to give security, when they pressed, were made in ignorance of what had taken place between the plaintiff and Wallace as to the notes.

The parties at the conclusion of the case consented that a verdict for the plaintiff should be entered for \$1754.9, subject to the opinion of this court, which should have power to draw the same inferences as a jury might, and to reduce the verdict, if in their opinion it ought to be reduced.

The demurrer and the case upon the verdict were argued together.

*R. A. Harrison*, for the plaintiff, cited *Davey v. Prendergrass*, 5 B. & Al. 187; *Woosnam v. Price*, 1 Cr. & M. 352; *Ashbee v. Pidduck*, 1 M. & W. 564; *Strong v. Foster*, 17 C. B. 201; *Pooley v. Harradine*, 7 E. & B. 431; *Rayner v. Fussey*, 4 H. & N. 861; *Perry v. Holl*, 2 L. T. Rep. N. S. 259, 585; *McLemore v. Powell*, 12 Wheat. 554; *Creath's Administrator v. Sims*, 5 How. 192; *Bailey v. Adams*, 10 N. Hamp. 162; *Blake v. White*, 1 Y. & C. 420; *Cro. Eliz.* 352; *Ford v. Beech*, 11 Q. B. 842, 870, 871; *Frazer v. Jordan*, 8 E. & B. 303, 308, 309; *Clark v. Devlin*, 3 B. & P. 363; *Cowper v. Smith*, 4 M. & W. 519; *Wall v. Cockerell*, 3 L. T. Rep. N. S. 490; *Mayhew v. Crickett*, 2 Swanst. 185.

*Trew*, for defendant, cited *Taylor v. Burgess*, 29 L. J. Ex. 7; *Attwood v. Munnings*, 7 B. & C. 278; *Story on Agency* Sec. 62; *Hogg v. Snaith*, 1 Taunt. 347, 351; *Stor. Equ. Jur.*, Sec. 883.

ROBINSON, C. J., delivered the judgment of the court.

First, as to the demurrer, we think it results from the very terms of the defendant's contract as set out in the declaration that he was but a surety for Wallace, the principal debtor, for his covenant was that Wallace should pay,

and that in case of Wallace making default, then he, the defendant, would pay.

It was not necessary to aver, as is done in the plea, that the testator, David Darling, knew that the defendant was a surety only, for the transaction plainly shewed that on the face of it.

We think also that the plea is a good equitable defence.

The consideration is not usually stated in such defences more particularly than it is here, though in pleas set up as a legal bar, as in actions against endorsers of notes, and upon guarantees, in which cases courts of law entertain the defence on the same principles as courts of equity do, it is usual to state the consideration in order to shew a binding agreement to give time. In *Strong v. Foster*, (17 C. B. 201,) the plea was in this respect like the present, and so also *Pooley v. Harradine*, (7 E. & B. 431.) There is nothing in our opinion, therefore, in the first exception taken to the plea.

The second objection is that the agreement to give time may for all that appears have been by parol, and if so it could not have relieved Wallace from his covenant to pay on the days named in it, but that objection is also untenable. Courts of equity make no distinction in such cases between engagements under seal and those by parol. If a mortgagee were to extend the time for paying the debt, and take notes payable at more distant days, he would not be allowed to enforce his demand for the money till the notes fell due. The case of *Rees v. Burrington*, (2 Ves. Junr. 542,) is a clear authority on that point.

The third exception we have already noticed. It is plain on the contract of defendant with the plaintiff, as set out in the declaration, that the plaintiff stood in the position of a surety for Wallace. He made himself liable in case of Wallace's default, and his engagement was not to pay himself, as the primary debtor, but that Wallace should pay. The only difference, on reflection, between this case and that of any other surety for the payment of money, is that the defendant became surety in consequence of having an original transaction with Wallace on his own account by the sale of the mortgage; but his undertaking that the debt



should be paid by Wallace, or by himself, was not necessarily a part of the transaction. The plaintiff exacted from him that he should guarantee the payment by Wallace or he would not buy the mortgage, and the defendant agreed to it, but this only shews how he came to be surety for Wallace, it does not make him the less a surety, nor deprive him of any equitable or legal protection to which sureties are entitled.

The last exception is that the plea does not state that the defendant was prejudiced by time having been given to Wallace. That is sometimes, not always, stated in pleas of this description. When the agreeing to give time to the principal operates as a discharge of the surety, it is not a necessary part of the defence that the surety has been prejudiced by the agreement. (a)

It is laid down in many cases in the broadest terms that when time has been given, by which is meant when the creditor has engaged to give time and has given it, the surety will be held discharged, though it be proved that the time was given in consequence of the principal's inability to pay, or that no injury had accrued, or even that it was manifestly for the surety's advantage; for it is held that the surety himself is the proper judge, and has alone the right to determine what is or is not for his benefit.

If one, therefore, be surety by bond for the debt of another payable at a given day, and the obligee take promissory notes payable at a subsequent period, he thereby discharges the surety. Mr. Story in his treatise on Equity Jurisprudence, sec. 883, cited on the part of the defendant, states this as the result of the authorities, and so also does Mr. Pitman in his work on Principal and Surety, p. 171, and the cases cited by him fully support him.

The defendant is entitled, we think, to judgment on the demurrer.

As to the verdict, the first question is, whether the plaintiff was entitled to succeed on the plea of *non est factum*. This brings up the point whether the power of attorney given

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(a) See Chy. on Plg. III., 113, 162; Rees v. Berrington, 2 Ves. Junr. 542; Nisbet v. Smith, 2 Br. C. C. 579; Skip v. Huey, 3 Atk. 91.

by defendant to Mr. Hector Cameron gave him authority to make the deed which he did make in the defendant's name.

It did not in terms give him power to sell mortgages belonging to the defendant, still less to covenant in his name that the mortgagors would pay punctually the debt secured by them; but when it is shewn by evidence, and indeed not denied, but admitted by the defendant himself, that he had himself personally before his departure agreed with the plaintiff to sell him the mortgage of Wallace, and to undertake that Wallace should pay the debt, and when it is further proved that the defendant instructed his attorney to do exactly what he did, then we think the making of the deed became one of those matters and things which "it was necessary and proper for his attorney to do *concerning* the business and affairs" of his principal; and the defendant, after receiving the money which he agreed to take for the mortgage, could not be allowed to dispute the validity of the assignment made by his attorney in his name, and to disclaim being bound by the special undertaking which he admits was part of the transaction, though he had at that time forgotten it.

As to the second issue raised by one of the replications, whether the plaintiff did or did not agree to give time as in the plea alleged, we think it was clearly proved that he did so agree, for it was shewn that he agreed at least to wait while the two notes were running, which he took for one year's interest at twelve per cent. It would have been most contrary to equity if he had pretended that he was not bound to wait during the time the notes were running. A court of law would no more have allowed him to sue in the meantime upon his mortgage than a court of equity would. The proceedings would have been stayed if he had attempted to enforce payment of the mortgage debt in the meantime. The plaintiff did nothing so unreasonable, and having in fact waited not only while those notes were running, but also for another year, while the two notes were running which were afterwards given for the next year's interest, the jury would have been well warranted in taking the fact of his having waited as evidence that he had agreed

to wait, especially when the facts themselves are so inconsistent with any other supposition.

There is no substantial difference between taking notes for the interest only and notes for the principal, for it is the effect of the one as clearly as of the other to shew an express understanding that the period for paying the debt itself was prolonged, else for what was the twelve per cent. to be paid? All that is said by the Lord Chancellor in the case referred to in the judgment on the demurrer, of *Rees v. Berrington*, (2 Ves. Junr. 540,) applies equally to this case, for there the original debt was upon a specialty, and notes had been taken extending the time of payment.

As to the third replication of the plaintiff to the defendant's plea, that after the supposed giving of time the defendant ratified that agreement, and promised to pay the debt, the evidence seems to shew clearly that the defendant knew nothing of the agreement to give time by Wallace, or that any thing had taken place between them which could in law or equity operate as his discharge as surety, until after he, the defendant, was sued; and the plaintiff gave no evidence to the contrary, nor attempted to prove that there had been any stipulation that the surety was not to be discharged.

In truth this is a strong case of the creditor having substituted in effect a new contract with his debtor, without the consent or knowledge of the surety. If he was content to do so for a consideration very substantial and sufficient, he cannot, in equity at least, still hold the surety bound to see the first contract carried out. A court of equity would, we think, certainly grant a perpetual injunction against suing the defendant under the circumstances.

BURNS, J., concurred.

McLEAN, J., gave no judgment.

Judgment for defendant on demurrer.

*Postea* to defendant.



## FELLOWES V. HUNTER.

*Slander—Libel—Fraud in sale of land—Words not actionable—Pleading*

The first count set out that the plaintiff was a trader in the purchase and sale of land, and in the lending of money: that the defendant had purchased a lot of land for himself and the plaintiff, which they agreed to divide by lot, one to take the east the other the west half, the latter being of most value: that two slips of paper were used, marked east half and west half respectively, and that defendant drew the east half. And it was alleged that in speaking of the plaintiff in reference to his said trade and to this transaction, defendant had asserted that the slips were prepared by the plaintiff, who asked the defendant to draw first, and that after having drawn he discovered the plaintiff altering the E. on the other slip into W., so that in fact both had E $\frac{1}{2}$  on them, and defendant was thereby precluded from getting any thing but the east half.

In another count, after stating the same trick, defendant was alleged to have added, "It then struck me I was swindled." And in another, he was said to have prefaced the relation with "He cheated me out of 100 acres of land," and concluded by saying, "So he cheated and swindled me out of the lot."

*Held*, on demurrer, that no cause of action was shewn, for the words alleged in the first count could not be treated as spoken of the plaintiff in any trade or business, but in a private transaction; and the additional words stated in the other counts were not of themselves actionable.

A fifth count charged defendant with saying that one M., at the time of the election, had mortgaged his property to the plaintiff without consideration, and that the plaintiff afterwards foreclosed and took it from him without paying any thing, and adding, "The fact is he is a villain and a thundering thief." *Held*, not actionable.

The sixth count was for a libel, in which the defendant had stated that the plaintiff stood charged with the crime of forgery, committed not against one man but a whole community. Defendant pleaded, justifying this charge by setting out at length a fraud committed by the plaintiff and others at an election by falsifying the poll books, and inserting fictitious votes, and his trial and conviction therefor; and he alleged that this was what he referred to in that part of the libel, and was understood to mean by all to whom it was published.

*Held*, sufficient.

This was an action for slander and libel.

The first count of the declaration stated in substance that the plaintiff was a trader in the purchase and sale of land, and in the lending of money, and had always carried on the said trade with integrity, &c.; that in the prosecution of such trade he purchased by and through the defendant, but in defendant's name, from one P., and defendant in his own name purchased for the plaintiff from said P., one undivided half of lot 19, in the first concession of Caledonia, and defendant purchased for himself the other half; that it was agreed between them that defendant should give the plaintiff a deed of his half, for which the plaintiff had paid one-half of the purchase money paid to said P., and that as the west

half was of more value than the east half, it should be decided by lot who should have it: that two slips of paper were used with the word " $E\frac{1}{2}$ " on one, and " $W\frac{1}{2}$ " on the other, which were put into a hat; and that defendant drew the east half, and thereupon conveyed to the plaintiff the west half. The count then charged that the defendant afterwards, contriving to vex the plaintiff in his said trade and business, and otherwise, in a certain discourse with one L., of and concerning the plaintiff, and of and concerning the plaintiff in his said trade and business, and in the said purchase of right to and ballotting for the division of said lot, and obtaining the west half thereof, spoke to him of and concerning the plaintiff, and of and concerning him in his said trade, &c., the following false, malicious, and defamatory words: "I will tell you a matter that occurred between him and me. I bought a lot of land at Caledonia springs. After I bought it, he said to me, you have made a good speculation. I said, if you think so you can have one half, which was agreed to. We arranged to divide the lot by east and west halves. The west half was the best. It was proposed by him, and agreed to by me, to toss up as to who should get either half. He afterwards said we had better draw lots, which I agreed to. He prepared two slips of paper, which were to have  $E\frac{1}{2}$  on one, and  $W\frac{1}{2}$  on the other, and said as he had made them I had better draw first. I drew and got one with  $E\frac{1}{2}$  on it. Supposing all right, I turned round to light my cigar, but turning back suddenly I saw him altering the E. on the other slip into W., so that both of them had  $E\frac{1}{2}$  on them, and I was thereby precluded from getting any but the east half."

The second count charged the conversation to have been with one P., concerning the plaintiff, in his trade, &c., and the defamatory words were in substance a statement of the same trick or fraud as set out in the first count.

The third count was to the same effect, except that these words were added," "It then struck me, (that is, on discovering the plaintiff in the act of altering the letter on the slip,) that I was swindled."

The fourth count alleged a statement by defendant of the

same contrivance, but prefaced by the words "He cheated me out of one hundred acres of land," and concluding with "So he cheated and swindled me out of the lot."

In the fifth count the charge was that defendant spoke of the plaintiff in his said trade, in the following words: "McCaul, about the time of the election, made over his property by mortgage to Fellowes, without a fraction of consideration. Fellowes has since foreclosed upon him, and taken the farm from him. The fact is, he is a villain and a thundering thief, a villainous thief, a thief."

The sixth count was for a libel contained in a letter addressed by defendant to the editor of a newspaper, and published therein. It contained various charges against the plaintiff, and began thus: "Sir—I see the hero of the Cambridge fraud" (meaning the plaintiff) "is again in town. Though convicted in the judgment of every man in this community of conduct which must make his name for years to come a by-word for all that is unprincipled, he walks about with as brazen a face and defiant a port as ever. Let us see which of our citizens will give him the hand of fellowship. If there be any disposed to do so let them beware, for their own reputations are in danger. This man stands charged with instigating and aiding in the commission of a crime, even the crime of forgery, and forgery committed not against one man but against a whole community, and committed not in one solitary instance, and under strong temptations, but in many instances, and without any other temptations than the lust of office, and a total disregard of all obligations of law and justice. \* Let them too reflect, that to screen this forgery he subsequently suborned his accomplices in crime to commit even on the floor of the legislature the most deliberate and palpable perjury, &c. Forgery, perjury, and deliberate premeditated swindling must all be laid to his charge."

And it was alleged that by reason of the premises many persons had refused to have any transaction or discourse with the plaintiff in his trade or otherwise.

The defendant demurred to the first four counts, alleging as grounds of demurrer that the words charged were not



actionable : that the alleged trade or business of the plaintiff is not a trade or business recognised by law, so as to make said words, or any of them, actionable : that said words were not spoken or published of any matters or transactions in the plaintiff's said trade or business : that it is not shewn how said matters or transactions, the subject of said words, were in any way connected with the plaintiff's said trade or business, or how they were prejudicial to him therein, as in fact they were not.

And he demurred also to the fifth count on the same grounds, and because the words "thief and villain" do not impute or charge any crime against the plaintiff, but are to be read in connexion with the preceding words in said count, and are but an inference or conclusion from the transaction previously mentioned.

To the sixth count, as to the words there mentioned as contained in the libel to the \*, and to so much of any other part of the said alleged libellous matters as imputed or appeared to impute to the plaintiff forgery, the defendant pleaded, setting out at length the frauds committed at the election of the plaintiff, in the township of Cambridge, and the falsifying the poll books, &c., in which defendant was implicated, which will be found fully stated in the report of the criminal proceedings against him therefor, *Regina v. Fellowes*, (19 U. C. R. 48); and defendant alleged that the charge of forgery, or of forgery committed against a whole community, and committed in many instances, in any way imputed in the said alleged libellous matter pleaded to, was the falsifying the said poll books, and the falsely and fraudulently entering and recording, and causing to be entered and recorded in said poll book from time to time, and at many times during the election, of the false, fraudulent, and fictitious names and votes, and the plaintiff's connexion therewith, and was so meant and intended by said defendant in the said libel, and was so understood by all to whom it was published; and that the plaintiff was afterwards duly convicted and sentenced for said conspiracy.

To this plea defendant demurred, on the ground that the defendant admitted by it that he charged the plaintiff with the

crime of forgery, but ought to qualify the charge by alleging that he intended and was understood to intend a different charge, which was not forgery; that forgery is a distinct crime known to the law, and that it is no justification for defendant to allege that it is true he charged the plaintiff with forgery, but that he intended to make a charge of a different nature.

*Richards*, Q. C., for the demurrer, cited *Cooke on Defamation*, 17; *Bellamy v. Burch*, 16 M. & W. 594; *James v. Brook*, 9 Q. B. 7; *Ayre v. Craven*, 2 A. & E. 2; *Hearne v. Stowell*, 12 A. & E. 719; *Brayne v. Cooper*, 5 M. & W. 249; *Lumby v. Allday*, 1 Cr. & J. 301; *Pemberton v. Colls*, 10 Q. B. 461; *Hopwood v. Thorn*, 8 C. B. 293; *Tighe v. Cooper*, 7 E. & B. 639; *Nixon v. Harvey*, 8 Ir. C. L. Rep. 446.

*Anderson*, contra, cited *Hawk. P. C.* vol. I., p. 318; *Thomas v. Jackson*, 3 Bing. 105.

ROBINSON, C. J., delivered the judgment of the court.

We do not think the first count can be held to contain words slandering the plaintiff in his trade of buying and selling land, if that could be taken to be a trade within the meaning of the law bearing upon such a question as is raised here. According to the statement in the first count, it was the defendant who acted as the trader in buying the lot from Pattee, and he proposed, after he had bought it, that the plaintiff should take half. That was only such a transaction as might take place by any individual purchasing a lot of land with any other individual; and as to what defendant is charged with having said about a trick played upon him by the plaintiff in the balloting, to determine which should have one half of the lot and which the other, though it would have been a very indecent aspersion, supposing it to be untrue, as we must, since the defendant has not pleaded truth in his justification, yet we think we cannot call such a charge slandering of a man in a trade or calling. What was charged to have been done wrong by the plaintiff was in a single transaction, having no reference to any one trade more than another, nor to any trade, unless the drawing lots is called a trade, which it is surely not. It would be illegal,

as a general rule, under the lottery acts, but such a transaction as that in question would be an exception, being merely a mode of partition between those already holding a joint interest, which the statute against lotteries allows.

The second count is bad, we think, for the same reasons as the first. The count only states a private transaction by the plaintiff with defendant, for acquiring by the plaintiff an interest in 100 acres, and imputing to him a dishonest action for getting the best half, but cannot be treated as slandering the plaintiff in any trade or business.

The third count, if it is actionable more than the two preceding, can only be so on account of the words, "It then struck me I was *swindled*." The addition of the words "I was swindled," do not make the words in this count actionable, if they would not be actionable without, for the word "swindling," or "swindler," *per se*, is not actionable, as has been determined in *Savile v. Jardine*, (2 H. Bl. 531,) and in other cases.

The fourth count is for saying of the plaintiff, and of and concerning him in his trade and business, "He *cheated* and *swindled* me out of the lot," after describing the alleged transaction very much as in the other counts; and we must say of this count, as of the third, that the words charged in it are not more actionable in themselves than those in the first and second counts, the addition of the words "cheated and swindled me out of the lot," not being actionable unless spoken of a man in his trade or profession; and as we have already stated, we do not think that there is any such allegation of a trade or business as can lay a claim to special damages.

The fifth count charges defendant with saying of the plaintiff that about the time of the election one McCaul made over his property by mortgage to the plaintiff, without a fraction of consideration, and that the plaintiff afterwards foreclosed upon him, and took the farm from him, not paying any thing at all. "The fact is he is a villain and a thundering thief." The words here charged cannot be held actionable, for they do not impute an indictable offence. It is not explained that the defendant was in any manner



imposed upon when he gave the mortgage to the plaintiff, and there have been not a few cases in which a party has transferred or mortgaged his property to another for some purpose of his own, perhaps fraudulent, and has found difficulty in obtaining its restitution from the person whom he has trusted; but it cannot be assumed that in all such cases, if in any, the person receiving the voluntary conveyance is liable to be indicted because he does not restore the property. People sometimes in these cases fall into the pit which they have made for others.

The sixth count is for publishing a libel of the plaintiff. This count is not demurred to, but the defendant pleads the truth of the charge as a justification, and the plea is demurred to by the plaintiff, on the ground that it is pleaded as a justification for imputing to the plaintiff in the alleged libel the crime of forgery, whereas the facts which the defendant relies upon in his plea if true do not prove that the plaintiff committed what the law treats and regards as forgery, and therefore they did not warrant the defendant in publishing the libel complained of.

It does not appear to us that the plea is insufficient. The defendant only undertakes by it to justify certain passages in the alleged libel, leaving the rest unnoticed in the plea. He is at liberty no doubt thus to confine his plea to particular parts of the publication. Then the question is, does the matter stated in the plea, if true, (and we must for the present assume it to be admitted by the demurrer,) bar a recovery of damages against him for what is stated in those pages. We think the defendant must be allowed to say, as in substance he does, "When I applied the expressions which I did in the passage mentioned in the plea, and when I did there or elsewhere in the libel apply to his conduct the term 'forgery,' I used the word forgery in no other sense than as characterising, according to my ideas, the conduct which in those passages I was imputing to the plaintiff." In actions for slander or libel, a particular epithet of that kind may be taken in a sense more or less grave than its ordinary meaning, by understanding it in connexion with the context, which will generally shew us in what sense the word was

used. The libel, as the plaintiff has set it out, fortifies the plea, by showing, as it seems to us to do very plainly, that the defendant did not mean to charge the plaintiff with forgery in any other sense than as a term which he thought it proper to apply to the conduct which he described; and then he submits to the court and jury that if that was properly called by him forgery, then he published what was true, and if it was not properly called forgery, then the libel must be understood in that mitigated sense, that he meant only to charge that as forgery which he described, and which he thus enabled the public to judge of and put their own construction upon.

He says, in other words, "I imputed forgery to the plaintiff, so far as that would be forgery, and I was not and could not be understood by the public to mean any thing more."

Judgment for defendant on demurrer.

### REGINA V. MOODIE.

*Sheriff—Sale of deputation of his office—Illegality—Forfeiture of office—5 & 6 Ed. VI., ch. 16; 49 Geo. III., ch. 126.*

The defendant, a sheriff, agreed, as the jury found, with one O., to give him all the fees of his office, except for certain services specified, in consideration of which O. was to pay him £300 a year, quarterly in advance, not out of the fees, but absolutely, and without reference to their amount. *Held*, clearly an agreement prohibited by the 5 & 6 Ed. VI., ch. 16, and 49 Geo. III., ch. 126, and that the effect of it was to forfeit the office upon conviction under a proceeding by *scire facias*.

*Held*, also, that the evidence stated in the case warranted the jury in finding that the agreement was in the terms above mentioned.

This was a proceeding by *scire facias* at the suit of the Crown against the defendant, sheriff of the county of Hastings, in which it was alleged that the defendant had forfeited his said office of sheriff, for the following among other reasons, set out in the writ of *scire facias*, namely, *first*.—That the defendant did, on the 1st of May, 1856, in violation of the statutes 5 & 6 Ed. VI., ch. 16, and 49 Geo. III., ch. 126, bargain and sell his said office of sheriff of the county of Hastings, or some part thereof, to one Dunham Ockerman, and unlawfully received and took money therefor.

*Secondly*.—That the said defendant did, on the said day,

in violation of the same statutes, bargain and sell the deputation of his said office, or of some part or parcel thereof, to the said Dunham Ockerman, and did unlawfully receive and take money therefor.

The defendant pleaded, (among other pleas :) 1. A traverse of his appointment to the said office of sheriff. 2. A denial of the bargain and sale of his said office, and of the receipt of money therefor as alleged; and 3, a denial that the defendant bargained and sold a deputation of his said office, or of any part thereof, or received any money therefor, as alleged.

On these pleas the Crown took issue.

At the trial, at Belleville, before *Burns, J.*, the following evidence was given :

*Dunham Ockerman.*—About the 1st of May, 1856, I made a bargain with defendant about his office. It was in writing, and executed by defendant and myself. A bond was given by myself, Mr. Ponton, and Mr. Hutton. They were executed in duplicate. The defendant took one set, and I left mine with Mr. Ponton for safe-keeping. (Notice to produce was served. Defendant did not produce his.) I understood from defendant, in the summer of 1857, that he had burnt his copy for fear of getting into the hands of the government. He told me that Mr. Dougall had made a complaint to the government, and he asked me to burn mine also, but I did not.

*William H. Ponton.*—I was an attorney in May, 1856. I was only suréty for Ockerman, and as such had conversation with defendant. I gave my opinion, I have no doubt, as a friend to him. I am not aware that defendant consulted any professional person, or any other than myself. I charged defendant nothing, and never considered I was his legal adviser. From the hour I executed the document I have not seen it since; but it is a fact that it was in my possession, for my brother found it, and he gave it to the defendant, before the commencement of these proceedings. That document was inquired for by Ockerman also. (Notice to produce that document was admitted; it was not produced.)

*James Ponton.*—I found the document in my brother's office about two months ago. I had no authority to give it to the defendant, but I did give it to him on his telling me that my brother said he should have it. I found that was not so, and I wrote to defendant to return it to me, but he has not done it. My brother was in the outer office at the time.



*William Ponton.*—I gave no authority to any one to give that document to defendant. Whatever arrangement the defendant and Ockerman may have had has ended long since.

*Dunham Ockerman.*—I read over the document myself, as well as its having been read. I have a perfect recollection of the contents. I was to pay defendant £300 a year, quarterly, in advance, and I was to have all the fees of the office, except land-tax sales, attending courts, and the elections. The £300 a year was absolute, not to depend upon the fees at all. If any loss it was mine. The agreement was to take effect on the 1st of May, 1856, to last one year, or as long after as we agreed, to be determined by either party. I entered in on that agreement, and regularly paid the defendant until February, 1859. I executed the office faithfully, as well as I knew how. He took no part in the business. I defended all the suits on my own responsibility, and if a suit was lost I paid it. I executed the whole office of sheriff, with the exception of what I have mentioned, and I received all the fees for my own benefit. I received a paper, a power of attorney to collect fees, recently. I prove his hand writing, dated the 6th of November, 1860. (Read :) (a) I paid all the accounts against the office. Books were kept in the office. First I continued on with his books, and when they were filled I bought others and paid for them myself. I employed the clerks in the office, and paid them myself, and paid all printing and other bills. At the time of this agreement I was appointed deputy-sheriff. Previous to that time I had occasionally served a process.

*Cross-examined.*—Had no written authority as deputy at the first agreement. Got the written authority about two years ago. I did not make any estimate of fees, &c., when I made the arrangement. I thought about it, and expected to make enough to pay and compensate myself. I had no idea that I was doing any thing illegal, and I suppose the defendant acted in the same manner. I supposed I was making a fair bargain, and he supposed the same thing. There was no concealment about the matter in any way. The £300 was not based upon any idea that it amounted to half of the fees, but I expected to pay him, and reimburse myself from the fees of office. The defendant was in and out of the office at times, and he might have looked at the books whenever he liked. I had no person employed to draw the agreement. I always supposed it was drawn by Mr. Hutton. I first objected to the payment in advance, but defendant would have it so, and I yielded. The agreement

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(a) This was a power of attorney to collect all fees due to the office between the 1st of May, 1856, and the 1st of February, 1859.

was that I was to have all the fees, except those reserved already mentioned. I do not think I made any thing worth while on it. When the arrangement ceased, we then entered into another arrangement. Our position is since changed. I have no ill-will against the defendant. The defendant has taken the business out of my hands and employed another person. I have not received the document since it was executed, but I read it that day, and before. I paid the defendant \$300 at the commencement, which of course was not from any fees.

*W. H. Ponton.*—My recollection of the contents of the agreement is not exactly as stated by Ockerman. The conversation was before the document signed that £300 was to be paid, but that was based upon the idea of what would be the sheriff's half of the fees; but the £300 was not to depend upon any contingency whatever, and was to be paid in advance. I never read the paper at all; do not know the contents. The £300, however, was a fixed sum, whether the fees amounted to only £10. Both parties supposed every thing legal when they made the agreement.

*McKenzie Boughs*—Printer. Printed for the sheriff's office. When I presented a bill to defendant for payment, he said part of it was to be paid by Ockerman. I said perhaps it would be better in future that I should charge Ockerman. Before 1856, the payments were made by defendant, since then Ockerman paid. Ockerman paid the last account.

*William Harrison.*—I was book-keeper in the sheriff's office. Ockerman employed me. Came there on the 10th of November, 1856. Accounts were first made out in the name of Ockerman; they were rejected, and then they were made out in the sheriff's name. A book of services of writs was kept, which book was Ockerman's, and there was no setting apart of a portion of the fees; Ockerman took all. The sheriff came in and out of the office as usual, and looked at the books.

*Robert H. Jones.*—I was present in July or August, 1857, at a conversation between Ockerman and defendant. They were talking about the complaint which Dougall had made to government, and defendant said he had burnt up the bond, so that the government or Dougall could not get hold of it.

The defendant called no witnesses.

Upon this evidence a verdict was taken for the Crown, subject to the opinion of the court.

The questions were whether, under the facts appearing,

the defendant had made such a bargain and sale of his office, or of some part or parcel thereof, or of the deputation of his said office, or of some part or parcel thereof, as is rendered unlawful by the said acts of parliament, or either of them, or by any other statute or law in force in Upper Canada; and whether the said defendant had thereby forfeited his said office of sheriff of the county of Hastings.

If the court should be of opinion in the affirmative, then the verdict for the Crown was to stand, but if in the negative, then a verdict was to be entered for defendant.

*Wallbridge*, Q. C., for defendant, obtained also a rule *nisi* for a new trial upon the law and evidence, and upon an affidavit of the defendant.

*R. A. Harrison*, for the Crown, cited *Broom Leg. Max.* 843-4; *Tay. Ev.* 893; *Foott v. Bullock*, 4 U. C. R. 480; *The Queen v. Mercer*, 17 U. C. R. 601; *Ellis v. Ruddle*, 2 Lev. 151; *Chitty's Statutes*, vol. iii., p. 311; *Regina v. Charretie*, 13 Q. B. 447; *Grøeme v. Wroughton*, 32 Eng. L. & E. Rep. 561.

*Wallbride*, Q. C., contra, cited *The Attorney General v. Rogers*, 11 M. & W. 670; *Fussil v. Brookes*, 2 C. & P. 318; *Rex v. Mackintosh*, 2 O. S. 497.

ROBINSON, C. J., delivered the judgment of the court.

With respect to the first count, there was no pretence for the charge contained in it, that the defendant had sold his office of sheriff, and no attempt was made to prove it. The evidence applied solely to the charge in the other count, that he had sold "the deputation of his said office," or rather of a part of it, to Dunham Ockerman, contrary to the statutes.

The special case contains a full report of the evidence given at the trial, and the question submitted for our opinion is whether, under the facts appearing on the evidence, the defendant has made such a bargain and sale of his office, or of some part or parcel thereof, or of the deputation of his said office, or of some part or parcel thereof, as is rendered unlawful by the said acts of parliament, or either of them, or by any other statute law in force in Upper Canada; and



whether he has thereby forfeited his office of sheriff of the county of Hastings.

At the trial a general verdict was given for the Crown, which it was agreed should be subject to the opinion of this court. Upon the argument before us it was not attempted to support the verdict as it applies to the count for an alleged sale of the office, and a verdict should have been entered, and should now be entered, for the defendant upon that count.

As regards the other count, which charges the defendant with having sold to Ockerman the deputation of his said office, or a part of it, the first question is, how does it stand upon the facts proved. We see no ground for contending that the testimony given by Ockerman, and by Mr. William Ponton, did not fully prove a sale by the defendant of the deputation of his office of sheriff within the terms and intent of both the statutes, or rather perhaps of a part of it, for there were some exceptions in the bargain. The sheriff was still to receive the fees for land-tax sales, attending courts, and the elections. If such exceptions had the effect of making the transaction a sale of a part of the deputation only, and not of the whole, then in strict form there should have been a count to meet the case of a partial deputation, in which count a partial deputation should have been positively charged, rather than to include in one count a charge in the disjunctive of doing the one thing *or* the other, which gives ground for the objection that such charge is not a direct and positive charge of doing either. It seems to us, however, that the evidence did establish a sale of an entire deputation, that is, that Ockerman was authorised to represent the sheriff so far as he could in all acts of duty, though he was not to interfere with the fees for the particular services in question. The exception seems only to have regarded the fees.

The defendant on his part called no witnesses, so that the evidence given on the part of the Crown was uncontradicted, and the testimony of the witnesses for the Crown was consistent in all that was essential to the case, though there was this variation in the account given by Ockerman from that given by Mr. Ponton: the former stated that he was bound by his agreement to give, and did give £300 a year for the

deputation, to be paid quarterly, in advance; that that sum was not based upon any calculation between them as to what the half of the fees would probably amount to by the year, but was to be paid absolutely, whether it should be more or less than the half of the fees of the office which he should receive in each year.

The other witness, on the contrary, stated that before the bond was executed by Ockerman he heard him and the defendant conversing about the arrangement, and that the sum of £300 was based upon the idea of what would be the sheriff's half of the fees; but he states also, in terms as explicit as Mr. Ockerman did, "*that the £300 was not to depend upon any contingency whatever, and was to be paid in advance.*"

The difference in the two statements is really immaterial, for according to both the deputy was bound absolutely to pay £300 for the deputation, whether the half of the fees should turn out to be more or less than that sum. That is precisely such a bargain as the statutes prohibit. The having fixed upon that sum in consequence of the impression that it would not be found to exceed half of the fees is of no consequence, though if the agreement made after the conversation had been to the effect that Ockerman should pay £300 annually, provided that should be found not to exceed in each year half of the fees of the office, (deducting the excepted fees,) and that in case it should exceed the half, then that Ockerman should pay the half of the fees, and no more; had this we say been the agreement in substance, then the defendant might have contended that he had done only what was allowed, not by the 5 & 6 Ed. VI., ch. 16, but by the statute 49 George III., ch. 126, sec. 10.

The reason of the exception in favour of the defendant contained in the 10th section referred to, is fully explained in judgments which have been given in England in cases under these statutes, and is sufficiently obvious; but at any rate the exception is not in question, for this case, according to the evidence, was not one of the kind described in that exception, and the defendant therefore cannot claim to have the benefit of such exception.

The evidence must be admitted to have established that the defendant did precisely what the statutes prohibited: that is, he sold to Ockerman the deputation of his office, and took a bond to assure money for it, and did receive money for such deputation—that is, a certain sum paid and to be paid absolutely, without the payment being contingent upon the amount of fees to be received in the office; or, in other words, it was not a *payment to be made “out of the fees or profits of such office,”* which kind of arrangement is allowed by the statute 49 Geo. III., ch. 126, sec. 10.

This being so, the question submitted to us has been already determined in the case of *Foott v. Bullock*, (4 U. C. R. 480.) The question in that case came before this court not directly in a proceeding like the present case for the forfeiture of the office, but in a civil action brought by the plaintiff, sheriff of the western district, against the defendant, who had become security with the sheriff's deputy in a bond to the sheriff to pay him a certain sum annually for making him his deputy. The obligor pleaded as a defence that the bond was given for carrying into effect an illegal bargain prohibited by the statutes 5 & 6 Ed. VI., ch. 16, and 49 Geo. III., ch. 126, and was therefore void. The plea was demurred to as forming no defence to the action on the bond, but the court determined that it was a good defence, for that the statutes referred to were in force in Upper Canada; that the office of sheriff was an office to which the statutes applied; and the sale of the deputation for a certain sum to be paid absolutely, and not out of the fees, was an act which the statutes prohibited.

The case is undistinguishable from that now before us, and we are bound by the decision which this court has already come to upon it, confirmed, as it has been, in regard to the statutes referred to being applicable to offices concerning the administration of justice in Upper Canada, in the case of *The Queen v. Mercer*, (17 U. C. R. 602).

That late case was one indeed of a different kind from the present, being a proceeding by *scire facias* to declare the office of sheriff held by the defendant to be avoided by reason of his having purchased out the former incumbent of his



office by an agreement made contrary to the statute 49 Geo. III., ch. 126. But in it the question whether the statutes against the buying and selling of offices were in force in Upper Canada was very fully discussed, and this court, composed in part of different judges, agreed in the view taken of that point in *Foott v. Bullock*.

It seemed to us to be conceded upon the argument that looking at the language of the statutes, and considering these decisions, the bargain in the present case must be taken to have been such in its terms as came within them. We are of that opinion, and think that we must answer the question submitted to us in the affirmative.

The defendant, however, has moved for a new trial, on the grounds that the verdict is against law and evidence, contending that the effect of the evidence was to shew that what was in fact agreed upon was a division of the fees of the office, and not a sale of the deputation. The rule is moved also upon an affidavit made by the defendant.

As to the evidence given upon the trial, it did in truth establish, as we have before stated, that the deputation was sold to Ockerman for £300 a year, to be paid quarterly in advance, and that the money was paid according to that agreement. If the bond by which the deputy was bound, as the witness Ockerman stated, to pay £300 a year for the deputation, did really not bind him to pay the money absolutely, but only contingently, or out of the fees of the office, that should have been shewn by defendant producing the bond, which for all that appears it was in his power to produce, or by other evidence given of its contents. As the case is on the evidence, the bargain was to pay the £300 absolutely, and seeing how the case went to the jury, and the verdict which they gave upon the judge's charge, we must understand that they were satisfied that the bargain was to pay absolutely.

The affidavit made by the defendant is to the effect that he was not aware of any illegality in the agreement made by him: that the agreement made verbally before the bond was executed was "based entirely upon the amount of fees which the office would produce, having reference to a division thereof between the sheriff and his deputy: that it was well

known that the fees of the office would exceed £600 annually, and that the agreement was that the deputy should pay the defendant his half of the fees, instead, as is usually the case, of the sheriff paying the deputy his half, which amount they fixed at £300: that they employed Mr. Ponton, a professional man, to put the agreement in writing, and that defendant relied on him for doing what was right, and did not direct him in what form the writing should be drawn; and that the condition to make the payments quarterly in advance was suggested not by the defendant, but on the other side.

If a new trial were to be granted, the defendant could not give evidence in his own favour, and therefore his affidavit alone is not such ground as we could proceed upon.

It is opposed to the evidence upon the trial in regard to the nature of the verbal agreement which preceded the written one, if that should prevail against the contents of the writing, and an affidavit of Ockerman is filed, giving a wholly different account from that given in the defendant's affidavit. We are not therefore at liberty to assume that the facts were otherwise than as they were proved to be upon the trial, or that there was any mistake in making the agreement as it was made.

That the defendant was not aware that what he did was prohibited by law we may readily believe. Mr. Ponton, who knew the whole transaction, and who is a professional man, swore that he did not know that there was any thing illegal in it. The case of *The Queen v. Mercer* had not then occurred, but the case of *Foott v. Bullock*, which more closely resembled the present, had been determined nine years before, and was published, so that the illegality of the agreement might have been known to the defendant, though in fact it seems it was not known to him. It might have been expected that the statute 3 Geo. I., ch. 15, would have attracted the notice of sheriffs, because it relates especially to the office, and its provisions are consequently stated in the treatises on the office of sheriff, which must be frequently consulted by those holding the office.

A reference to the 10th and 11th clauses of that act would

shew the footing upon which the deputy may be legally remunerated in England by the sheriff; and that is by fees, or a portion of them, or by a salary or allowance made by the sheriff to him, and not by selling the deputation for a sum absolutely to be paid to the sheriff, which, in case the lawful fees should not amount to so much as would enable the deputy to pay it, would form a temptation to him to extort more than the legal fees in order to make up the deficiency.

Believing, which we can readily do, that the sheriff, who has been long in the office, was not aware that the law prohibited the kind of agreement which according to the evidence was made by him, and that his entering into such agreement would expose him to the forfeiture of his office, that is only advancing a ground of defence such as was advanced unsuccessfully in the case of *The Queen v. Mercer*, and might more reasonably have been advanced in the earlier case of *Foott v. Bullock*.

However strong a claim it may give to sympathy, and however much we must regret that in this case the sheriff should have brought himself within the penalty of the law, yet we cannot hold that in the view of a court of justice mere ignorance of the law forms an excuse.

The laws can only be administered upon the principle that they are known, because all are bound to know them and to obey them, a principle which lies at the foundation of all such cases. If it had been shewn that the defendant had not in fact made such an agreement: that he had given instructions to have the writing otherwise framed, and supposed it to have been in fact otherwise framed, and that his executing it in the form in which it was drawn up arose from a mistake on his part as to the fact, then such a defence would have consisted in something more than an alleged ignorance of the law, and might have availed.

The case cited in the argument of *The King v. Mackintosh* (2 O. S. 497) might have supported such a defence, but nothing that was said in it goes the length of supporting the doctrine, which is clearly untenable, that a party may rest his defence merely on the ground that he was, as he himself asserts but cannot prove, ignorant of the law, not alleging



that he acted under any mistake in regard to facts, or under any compulsion. A reference to the authorities cited in *The King v. Mackintosh*, (2 O. S. 497); *Reniger v. Fogossa* (Plowden 17) *Foster's C. L.*, Appendix, 440; *Calcraft v. Gibbs*, (5 T. R. 19,) and *Warneford v. Kendall*, (10 East 19,) will explain the distinction between an alleged ignorance of the law and such defences as were alluded to in those cases, and in the case of *The King v. Mackintosh*.

There is yet this to be considered in regard to the case before us, that although in *Foott v. Bullock*, already cited, the very question was determined which is the foundation of the proceeding against the defendant—namely, whether it is in this province an offence to sell the deputation of the office of sheriff for a certain fixed sum to be paid annually to the sheriff, and to be paid absolutely, and not out of the fees of the office—yet that question came up incidentally, in a suit brought by the sheriff to collect the sum for which he had sold the deputation. The court held that he could not enforce the bond which he had taken to secure the payment, because such a transaction was rendered illegal by the British statutes, which the court held were in force here. So far the decision in *Foott v. Bullock* is binding upon us in this case, but it was not a question in that case whether the sheriff had forfeited his office by selling the deputation contrary to the statutes.

In the other case we have referred to, of *The Queen v. Mercer*, the object was, as in this case, to obtain a judgment of this court declaring the office of sheriff held by the defendant to be forfeited by an act done by him contrary to the statutes referred to, but the cause of forfeiture was the purchase by the defendant of the principal office, not the sale of a deputation, so that neither case goes the whole length of deciding the present question, whether the sheriff by selling a deputation of his office contrary to the statute, forfeits his office of sheriff. We find ourselves compelled by the very words of the act to adjudge that the office is forfeited, for though the cause of forfeiture is not precisely the same as in *Mercer's* case, yet the provision in the statute for forfeiture of the office is as express and distinct in the one case as the other.

The second clause of the statute 5 & 6 Ed. VI., ch. 16, enacts, "that if any person at any time hereafter shall bargain or sell any office, or offices, or deputation of any office, or any part or parcel of any of them, or receive, have, or take any money, fee, reward, or any other profit, directly or indirectly, or take any promise, agreement, covenant, bond, or any assurance to receive or have any money, fee, reward, or other profit, directly or indirectly, for any office or offices, or for the deputation of any office or offices, or any part of any of them, or to the intent that any person should have, exercise, or enjoy any office, or offices, or the deputation of any office or offices, or any part of any of them; which office or offices, or any part or parcel of them, shall in any wise touch or concern the administration or execution of justice," \* \* "that then all and every such person and persons that shall so *bargain or sell* any of the said office or offices, *deputation or deputations*, or that shall take any money, fee, reward, or profit, for any of the said office or offices, deputation or deputations of any of the said offices, or any part of any of them, or that shall take any promise, covenant, bond, or assurance for any money, reward, or profit, to be given for any of the said office or offices, deputation or deputations of any of the said office or offices, or any part of any of them, *shall not only lose and forfeit all his and their right, interest, and estate*, which such person or persons shall then have, of, in, or to any of the said office or offices, deputation or deputations, or any part of any of them, or of, in, or to the gift of nomination of any of the said office or offices, deputation or deputations, for the which office or offices, or for the deputation or deputations of which office or offices, or for any part of any of them, any such person or persons shall so make any bargain or sale, or take or receive any sum of money, fee, reward, or profit, or any promise, covenant, or assurance, to have or receive any fee, reward, money, or profit, but also that all and every such person or persons that shall give or pay any sum of money," &c., (applying the provisions of this clause in several lines which follow to the person buying the office or deputation,) shall "be adjudged a disabled person in the

law, to all intents and purposes, to have, occupy, or enjoy the said office or offices, deputation or deputations, or any part of any of them, for the which such person or persons shall so give or pay any sum of money," &c.

That this statute does apply to the office of sheriff, and that it is in force in this province by our adoption of the law of England, and especially the criminal law, and also by virtue of the statute 49 Geo. III., ch. 126, which expressly extends the statute 5 & 6 Ed. VI., ch. 16, to the plantations and colonies belonging to the United Kingdom, has been determined by us in the case of *The Queen v. Mercer*; and that the effect of the two statutes is to forfeit the office upon conviction is too clear to be disputed.

There is nothing else material to be remarked upon but the provision in the 10th section of 49 Geo. III., ch. 126, which is that nothing in that act contained (nor by consequence any thing contained in 5 & 6 Ed. VI., ch. 16,) shall extend, or be construed to extend, to prevent or make void any deputation to any office in any case in which it is lawful to appoint a deputy, or any agreement, contract, bond, or assurance, lawfully made in respect of any allowance, salary, or payment, made or agreed to be made by or to such principal or deputy, respectively, *out of the fees or profits of such office.*

Some attempt was made at the trial to shew this to have been an agreement of that kind, but the weight of evidence was to the contrary, and the jury found that the agreement was such as was alleged in the pleadings: namely, that the deputy was to pay £300 annually, by quarterly payments in advance, not out of the fees of the office, but absolutely and unconditionally.

If the defendant had agreed to pay his deputy a certain sum of money annually for acting as his deputy, either in regard to all his ministerial duties or a part of them, or had agreed to give him a certain portion of the fees, or to take from him a certain portion of the fees, or a certain fixed sum annually out of the fees, he would not have brought himself within the statute, nor done any thing illegal.

We can easily believe that he was ignorant, as he says he was, that the particular arrangement which he did make with



his deputy was contrary to law, and if he was not aware of the provisions contained in these statutes, we can also readily believe that it did not occur to him that there was any thing objectionable in the method which he adopted of remunerating his deputy. In that respect there is a great difference between what was done in the present case and the buying and selling of an office of this kind. The latter could hardly seem to be a right thing to do, if there had never been a statute passed on the subject. What was done by this defendant might be done by many people, we think, of good intelligence, without its occurring to them that they were doing any thing injurious or dangerous to the public. Yet it is evident that great evils must have been found at an early period to have arisen in England from selling deputations of offices connected with the administration of justice, for a certain fixed sum to be paid for the deputation, without regard to what the legal emoluments of the office might amount to; and we can see clearly the abuses to which such arrangements might lead, when they are pointed out, as they have been in several of the cases which have been decided in England upon this statute. It can have been no imaginary evil that the legislature applied themselves to guard against by one of the most elaborate, precise, and carefully framed acts to be found among the British statutes.

And at any rate where prohibitions are in language so explicit we are bound to carry them into effect, and cannot be swayed by any opinions we may form of the adequacy of the motives which lead to them.

That the proceeding by *scire facias* is one suited to the case is clear, we think, although the defendant has not a freehold interest in the office.

We refer on that point to Com. Dig. "Officer," K. 8, 11, 12, 14, and to our statute ch. 21, Consol. Stats. U. C.; and to the following authorities as bearing on this particular case, Com. Dig. "Officer," K. 1; *Godolphin v. Tudor*, (1 Salk. 468; 6 Mod. 234;) *Gulliford v. De Cardonell*, (1 Salk. 466;) *Garforth v. Fearon*, (1 H. Bl. 331;) *Ellis v. Ruddie*, (2 Lev. 151,) Bac. Abr. "Offices and Officers" F.

We give judgment for the Crown upon the special case, and we discharge the rule *nisi*.

RICE v. JAMES DOUGLAS WELLS, JAMES PENDLETON WELLS,  
AND RUPERT MEARS WELLS.

*Agreement—Construction—Covenant to present papers personally to Ins. Co.*

Defendants by agreement covenanted to pay the plaintiff \$961.35, and by the same agreement it was made a condition that the plaintiff should allow his name to be used in prosecuting a claim in which defendants were interested, against a mutual insurance company: that he would personally present his particulars of loss, with the usual affidavits and certificates required by the company, whenever requested in writing so to do by any of the parties to the agreement; and that if the claim should be defeated by any gross negligence of the plaintiff then this agreement should be void. In an action upon defendants' covenant:

*Held*, that it was not necessary that the plaintiff should present the necessary papers in person to the company, or on the precise day named by defendants; and that he must be held to have performed the condition upon the evidence set out below, which shewed that the papers furnished by him were not objected to, and that the claim was not defeated owing to their insufficiency.

ACTION on a covenant in a deed, dated 24th June, 1859, whereby defendants promised to pay to the plaintiff the sum of \$961 35c., with interest, one year after date. The plaintiff alleged performance of all conditions precedent on his part, and non-payment by defendants.

The defendants, by James Douglas Wells, their attorney, set out the whole agreement, containing the covenant sued on, and various recitals relating to transactions between the plaintiff and James Douglas Wells, in purchasing oats for the plaintiff, one of which was that for the purpose of having the accounts settled, and the balance due from the said James Douglas Wells better secured to him, he, the plaintiff, agreed to lose and quit claim \$1000 out of the money so due and payable to him, on the following understanding and agreement: 1. That the said James Douglas Wells should give his promissory note at thirty days to the said David Rice for \$256, the receipt of which note was thereby acknowledged. 2. That the said James Douglas Wells should give his promissory note for \$700 at ninety days, endorsed by the said James Pendleton Wells, the receipt of which note was also acknowledged. 3. That the parties of the 1st, 2nd, and 3rd parts, in the said agreement, (the defendants,) should enter into a joint and several agreement for the payment upon certain conditions of \$961 35c. And it was thereby agreed, for and in consideration of the premises, that defendants became jointly and severally bound to pay unto the plaintiff,

his executors or administrators, one year from the date thereof, with interest at the rate of six per cent, the sum of \$961 35c., upon these conditions, which were conditions precedent and essential to the contract, namely, that the said David Rice would permit his name in the meantime to be used by the defendants on all lawful occasions or instances, in effecting a compromise with or prosecuting the Mutual Fire Insurance Company of Prescott: that he would personally present his particulars of loss with the usual affidavits and certificate required by the company, whenever requested in writing so to do by any of the parties thereto: that he would furnish, when required, any affidavits of parties residing in the United States, touching the dispute with the said insurance company, which might be reasonably required in the premises: that he would bring or cause to be brought from the United States such witnesses residing therein as might be supposed to support the said claim at the trial of the cause: that he would also, when required by an order of court or of a judge, attend at such places in Canada as were therein named, for the purpose of being interrogated in the matter of the claim, should the same be prosecuted by suit or otherwise: that the said Rice would not make any compromise with, nor commence any suit against the said company, without the consent in writing of the party thereto, Rupert Mears Wells, first had and obtained; and that he released to the said party of the first part (James D. Wells) all claims or demands which he might have against him, granting a full receipt and discharge for the same.

The agreement contained a release to James Douglas Wells of all claims, demands, dues, cause and causes of action, which the plaintiff might have against him in respect of the transactions therein referred to, and provided that the costs of any suit against the insurance company on their policy of insurance was to be borne by the defendants or taken from the amount recovered; and it was further understood that should the said claim against the said company be defeated through any gross negligence or fault of the plaintiff (Rice) after the date of that agreement, then that the said articles of agreement should be null and void.



The defendants, after setting out the agreement, in their first plea, set out as a condition precedent to their paying the money, that the plaintiff had agreed personally to present his particulars of loss, with the usual affidavits and certificate required by the insurance company, whenever requested so to do in writing by any of the defendants, but that he did not present such particulars of his loss and affidavits as were and are required by the said company, although duly requested in writing so to do, and thereby failed in the performance of the said condition.

*Second plea.*—That although duly requested in writing, according to the meaning, intent, and letter of the said condition in the said agreement contained, yet the plaintiff did not personally present the certificate mentioned in the said articles of agreement, according to the said condition and request, and thereby failed in the performance of the said condition.

*Third plea.*—That although duly requested in writing, yet the plaintiff did not present the said certificate of a magistrate most contiguous to the said fire, mentioned in the said articles of agreement, upon the day or within the time mentioned and limited in the request in writing given him, according to the condition contained in the said articles of agreement, and thereby failed in the performance of the said condition.

*Fourth plea.*—That it was provided and understood in the said agreement, that should the aforesaid claim against the said insurance company be defeated through any gross negligence or fault of the plaintiff after the date of the said agreement, then that the said agreement should be null and void; yet the plaintiff has violated the said provision or understanding, and by his own fault has caused the said claim against the said company to be defeated, and has thereby rendered the said agreement upon which this action was brought null and void.

The defendants took issue on all these pleas.

At the trial, before *Robinson, C. J.*, at Cornwall, the plaintiff called witnesses to prove performance of the conditions precedent.

Mr. McNeil Clarke proved that he saw the plaintiff at Prescott, in June last: that he got a statement drawn of the particulars of loss by fire, to be presented to the Mutual Insurance Company, and that it was furnished: that Mr. Patton, the secretary, read it, and said the claim seemed a fair one: that no objection was made to the statement. The statement and affidavit of particulars of loss were delivered at the insurance company's office at the same time. Afterwards the witness, Clarke, received, he thought, on the 6th July, the magistrate's certificate of the fire, loss, &c., and delivered them at the insurance office. He could not say whether the one shewn to him on the trial in the hand-writing of Mr. Lyons was the same or not. It was dated on the same day, 2nd July, and was received by mail. The certificate was from Zephaniah Hersey. This witness was then a student with Mr. Lyons. The fire was on the 4th of May, 1859, and on the 29th of June the papers were delivered at the insurance office. The witness wrote the statement shewn to him of that date.

Mr. Hiram Johnson, of Hawkesbury, proved that on the 29th of June he received a letter from the plaintiff enclosing a policy of insurance, and requesting him to deliver the papers accompanying it to R. M. Wells, one of the defendants, and to ask him if the papers were correct. The letter also enclosed a certificate, which the witness was requested to take to the nearest magistrate and get him to sign it. Johnson, on the morning of the 29th, shewed all the papers received by him to R. M. Wells, and told him the plaintiff wished to know if they were all right, to which Wells replied, "These are what I want," after having examined them. On the 2nd of July the witness gave the certificate, which he was requested to have signed by the nearest justice of the peace, to R. M. Wells, and went with him to the office of Z. Hersey, Esq., and saw the certificate signed by Mr. Hersey, at the request of R. M. Wells. On being signed Mr. Johnson forwarded them by mail to Mr. Lyons at Prescott, by whom the statement of loss and affidavit had been prepared and deposited in the insurance office on the 29th of June. The policy and statement received from the plaintiff by Johnson were delivered to Mr. R. M. Wells, and left with him.

On cross-examination the witness stated that the original statement, verified by affidavit, was left in the office at Prescott, and copies of the statement so furnished and affidavit were sent down to him, to be shewn to R. M. Wells, that he might read them, and say whether all was right; and that when R. M. Wells read them he said all was right—that was what he wanted.

Mr. Reynolds, the secretary of the insurance company, proved the writing of Mr. Patton, the former secretary, on the statement, and that all the papers produced on the trial were found amongst the papers in the insurance company's office.

Mr. Knapp, the agent of the company, proved that the plaintiff had a claim before Mr. Patton, the secretary of the company, for oats insured and lost, and that he saw the plaintiff's statement before the board: that he had been sent to ascertain the facts of the loss: that the plaintiff and James D. Wells came to him two or three days after the fire, and that he, witness, ascertained that the building could not contain 6,000 bushels of oats; but that Wells claimed for 11,000 bushels in the building, and afterwards for 9,000: that there was also an insurance in another office, and a claim on it, and that the witness found that the statement and affidavit given in that case differed materially from that which the Prescott company had received.

The witness Knapp stated further, that the opposition to the claim on the policy by the Prescott company was not on account of any defect in form in the statement and affidavit, though he had said that a written notice of loss had not been delivered in time; and he had told the plaintiff that he thought the company would never pay, on account of an attempt at fraud in regard to the quantity of oats said to be consumed: that the statement and certificate he thought were satisfactory, and he saw nothing wrong in them, and the company never exacted any others: that the company stood upon the merits, on the ground of fraud.

On cross-examination, Knapp said that the secretary of the company did not decide on the sufficiency of documents: that the board decided upon them: that an action was brought in the name of Rice, against the company, for the loss of the



oats, and they employed Mr. Richards to defend it : that he, the witness, told Mr. Richards that a written notice of loss had not been given within thirty days, and Mr. Richards seemed to think that the want of such notice would be a defence ; but the defence principally relied on was the fraud in regard to the loss : that he never heard a question raised as to the sufficiency of the statement and affidavit.

After the appearance of the defendants in the action it was not proceeded with.

Other affidavits were put in by Wells : that when the witness told the plaintiff that the company were resisting because they were satisfied there was fraud in the statement, that there had been a short delivery of oats by Wells, the plaintiff said he did not care whether the defendants recovered or not.

For the defendants, it was proved that a letter from R. M. Wells was delivered to the plaintiff on the day of its date, 27th of June, in which R. M. Wells stated that he thought it highly expedient, as so much delay had already taken place, that the particulars of the loss sustained by the plaintiff in consequence of the late fire at Hawkesbury should be put in as soon as possible, the sooner the better : that the plaintiff must take it to the office of the secretary of the insurance company, together with the magistrate's certificate, required by the condition of the policy : that Mr. Wells would be at Prescott on Monday then next, and as the application should be made before that, it would be necessary that the plaintiff should present the papers on the Saturday next at the farthest. The letter then pointed out to the plaintiff what the application should specify : 1st, the quantity of oats stored for the plaintiff in the building, which were purchased by and delivered for him there. 2nd. The quantity stored by J. D. Wells for the plaintiff in said building at the time of the fire, to the best of plaintiff's knowledge and belief.

Mr. Reynolds, the secretary of the insurance company, was called as to the sufficiency of the statement and papers sent in to the insurance company, and he said he thought they were not in conformity with the condition of the policy, because not positive, only from belief, founded on information of others.

Upon the evidence, the learned Chief Justice directed the jury that the plaintiff was entitled to a verdict upon the issues, and a verdict was rendered for the plaintiff for \$1043.03.

*Pringle*, for the defendants, objected to the sufficiency of the statement and affidavit sent in by the plaintiff to the insurance company, and to the direction of the learned Chief Justice to the jury, that Rice's undertaking to deliver papers personally meant nothing more than that he should deliver or cause to be delivered to the insurance company or its agent personally.

He further objected that putting particulars of loss and affidavit, or other documents, into the post office, or sending them by any other way by which they might reach the insurance company, could not be considered a compliance with the condition precedent, to be performed by the plaintiff personally, to present such particulars and other documents whenever requested in writing so to do by any of the defendants.

These objections were overruled, the learned Chief Justice holding that as to time the word "whenever" referred to the time of request, and not of performance.

*Adam Wilson*, Q. C., obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted, on the grounds that the plaintiff did not prove that he presented such particulars of his loss and affidavit as were required, although duly requested so to do, nor did the plaintiff personally present the certificate mentioned in the agreement according to the terms thereof, nor within the time provided for presenting the same. And for that there was misdirection on the part of the learned Chief Justice, in informing the jury that the plaintiff had duly performed his said agreement in other respects, or that there was evidence from which they might find so.

*J. S. Macdonald*, Q. C., for the plaintiff, shewed cause, and cited *Platt v. Gore District Mutual Ins. Co.*, 9 C. P. 405.

*Adam Wilson*, Q. C., supported his rule, relying on the

evidence as shewing that the plaintiff had not performed the conditions precedent mentioned in the defendants' pleas, and therefore was not entitled to recover.

McLEAN, J.—The agreement sued on bears date on the 24th day of June, 1859, and on the 27th, R. M. Wells, one of the defendants, wrote to the plaintiff, who was then at Hawkesbury, in reference to the sending to the office of the secretary of the insurance company at Prescott the particulars of loss sustained in consequence of the fire, together with the magistrate's certificate required by the condition of the policy, and that it would be necessary that the plaintiff should present the papers on Saturday then next, at the farthest.

The plaintiff had agreed that he would personally present his particulars of loss, with the usual affidavits and certificate required by the insurance company, *whenever* requested in writing so to do by any of the defendants. On receiving such request, the plaintiff was entitled to a reasonable time to do what he had undertaken; but the defendants contend that by the terms of the agreement he was bound to do so at any precise day and hour which either of them might choose in writing to prescribe, and they further insist that he was bound to deliver the documents with his own hands, at the insurance office at Prescott, at such time as might be pointed out to him.

On the 29th of June, two days after the receipt of R. M. Wells' letter of the 27th of June, the plaintiff was at Prescott, and gave in at the insurance office a statement verified on oath, as directed by Mr. R. M. Wells, according to the best of his knowledge and belief, of the particulars of his loss under the policy obtained from the Mutual Fire Insurance Company of Prescott. The statement and affidavit were received by the secretary of the company without objection, and without remark, except that it appeared to be a fair claim. On the day the statement of loss and affidavit were given in at Prescott, a certificate to be signed by the justice of the peace most contiguous to the fire was shewn to R. M. Wells at Hawkesbury or VanKleck's Hill, together



with copies of the documents furnished to the insurance company, with a view of seeing whether they were such as he approved of, and he then said they were all right, they were what he wanted.

The certificate of the justice of the peace was taken by the plaintiff's agent and R. M. Wells to the justice of the peace on Saturday, the 2nd of July, and signed at the request of the latter, and forthwith forwarded, to be given in to the insurance company at Prescott. Its receipt and sufficiency were acknowledged by the insurance company, and though an action was instituted against the company by the defendants, in the name of the plaintiff, no objection was ever urged on the part of the company that the documents received by them were insufficient, or were received too late.

The statement of loss and affidavit by the terms of the policy required to be delivered to the directors or secretary within thirty days after the fire occurred, and they were so delivered. The certificate under the hand and seal of the magistrate most contiguous to the place of the fire was delivered on the 2nd of July, or within a few days after, but as to that no particular time was limited by the policy within which it was required to be delivered, so that the recovery of the amount insured could not be jeopardised by any delay. Whether that document was presented by the plaintiff personally at the insurance office, or delivered by another at his desire, does not distinctly appear: in either case it must, I think, be regarded as a personal service on his part, and a substantial compliance with the terms of the conditions, which almost appear as if framed with a view to some ulterior object beyond the mere delivery of the documents in proper time at the insurance office.

The plaintiff by the agreement relinquishes to James D. Wells \$1000 of his demand, for the purpose of procuring a settlement, with security, for the balance due him, and the defendants now endeavor to defeat his claim for that balance, by setting up as a defence his non-compliance with conditions to which they attach or attempt to attach a meaning wholly inconsistent with the justice of the case.

The last plea alleges that the plaintiff has violated the

agreement, and by his own fault has caused the claim against the insurance company to be defeated, by reason of which the agreement has become null and void, but it is manifest that if the claim has been defeated the fault lies some where else than with the plaintiff.

I think that on the evidence the plaintiff is entitled to recover, and that the rule for a new trial must be discharged.

BURNS, J.—The contract is, that the plaintiff “will personally present his particulars of loss, with the usual affidavits and the certificate required by the company, whenever requested in writing so to do by any of the parties hereto of the first, second, and third parts.”

The second plea is, that although duly requested, according to the meaning, intent and letter of the said condition in the said articles of agreement contained, yet the plaintiff did not personally present the certificate mentioned in the articles of agreement, according to the condition.

The third plea the same, adding that the certificate meant was one signed by the magistrate most contiguous to the fire, and that the plaintiff did not do it upon the day or within the time mentioned and limited in the request in writing, given according to the condition contained in the articles of agreement.

There is nothing in the agreement obliging the plaintiff to be present personally at any particular time, or upon any particular day, so that plea was not proved so far as those allegations go.

The defendant's letter of request to deliver the papers and documents necessary to sustain the proofs is in these words : “You must take it to the office of the secretary of the insurance company, together with the magistrate's certificate, required by the condition of the policy. Mr. Wells will be in Prescott on Monday next, and as the application should be made before that it will be necessary that you should present the papers on Saturday next at the furthest.”

There is not a word in this request which necessarily implies that the plaintiff should personally be present. He is requested to take the paper to the office, but I imagine

that ninety-nine persons out of a hundred would suppose that such a request was complied with by sending his servant, or any person whom he could rely upon, to deliver, and who did deliver the papers at the office of the secretary of the company. So in the same way with the expression, *you should present the papers on Saturday*. In common parlance no one would understand these expressions to mean that it was absolutely necessary that the plaintiff should do these acts in person. If the defendant meant to convey to the plaintiff that his personal presence was required with the documents, he should either have used the precise words used in the covenant, or words to that effect, that would leave no room for doubt.

I think the verdict is right, and that the jury were well warranted in the belief that the pleas were not proved.

ROBINSON, C. J., concurred.

Rule discharged.

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ABBOTT V. SKINNER ET AL.

*Award—Construction—Pleading.*

An award made in March, 1860, directed that defendants should pay the plaintiff one-fifth of all the expenses that might be incurred by him after the 1st of October then next, for the mutual benefit of the plaintiff and defendants, in repairing a certain water-wheel, flume, bulkhead, &c., the plaintiff to have the right to say what repairs should be done; that the plaintiff should render to defendants monthly accounts, properly vouched for, of the expense of such repairs, and within one month from the time of rendering the same defendants should pay one-fifth of the amount thereof to the plaintiff; and it was further awarded, that should it be deemed necessary to put in a new wheel, &c., before the 1st of October then next, defendants should pay one-fifth of the expense incurred therein, on an account for the same being rendered to defendants, and vouched for, as before stated in said award for the proportion of future repairs.

*Held*, affirming the judgment of the county court, that defendants were bound to pay *monthly* for the expense of a new wheel, in the same manner as for the other repairs; that the plaintiff had the right to judge of the necessity therefore; and that in declaring upon the award it was sufficient to aver that it was deemed necessary, and that the plaintiff proceeded to put it in, as by the award he might do.

APPEAL from the county court of Frontenac, Lennox, and Addington.

The plaintiff sued defendants upon an award made on the 24th of March, 1860, by three arbitrators, by which he alleged it was, amongst other things, directed that the defen-



dants should pay to the plaintiff one-fifth of all the expenses that might by him, the said plaintiff, be necessarily incurred after the first day of October then next ensuing, for the mutual benefit of the plaintiff and defendants, in renewing or repairing the water-wheel, flume, bulkhead, head-gates, dams, or any other expenses that might be incurred for the mutual benefit of the said plaintiff and defendants, and that the said plaintiff should have the right to say what repairs should be done; and further, that the plaintiff should render to the defendants monthly accounts, properly vouched for, of the expense of such repairs incurred as aforesaid; and that within one month from the time of rendering such accounts, vouched for as aforesaid, the said defendants should pay one-fifth of the amount thereof to the said plaintiff; and that the said arbitrators further awarded, that should it be deemed necessary for the mutual benefit of the said plaintiff and defendants to put in a new wheel, flume, and bulkhead, or any of them, before the first day of October then next ensuing, then that the said defendants should pay one-fifth of the expense incurred, upon an account for the same being rendered to the defendants, and vouched for, as was before stated in said award as hereinbefore mentioned for the proportion of future repairs.

And the plaintiff averred that it was deemed necessary for the mutual benefit of the plaintiff and defendants to put in a new wheel, flume, and bulkhead, before the first day of October next after said award, and that he, the said plaintiff, proceeded to put in a new wheel, flume, and bulkhead, as by said award he might do; and that, in accordance with said award, a monthly account of the expenses incurred for the same, so far as they were incurred during the month of August, to wit, the month of August, 1860, properly vouched for, amounting to the sum of \$685.51 in the whole, was duly rendered by the plaintiff to the defendants, and thereupon the defendants, by virtue of the said award, became liable to pay to the plaintiff in one month from the time of rendering such account one-fifth of the amount thereof, to wit, the sum of \$137.70, and although one month had elapsed before the commencing of this suit since rendering said account to the

defendants, vouched for as aforesaid, yet said defendants had not paid one-fifth of the amount thereof, amounting to said sum of \$137.70 or any part thereof, as by said award it is awarded that they should do.

The defendants demurred, on the grounds, 1st, that it appears that the defendants' share of the expense of the therein mentioned new wheel, &c., was to be paid upon an account of the expense incurred for the same being rendered to the defendants, but the declaration does not allege that such an account was delivered, but alleges only that an account of part of the said expenses was delivered; namely, so far as they were incurred in the month of August.

2ndly. That the said part of the said declaration is ambiguous, and of doubtful meaning, in this, that it does not allege by whom the said new wheel, &c., were to be deemed necessary, and it is uncertain whether the plaintiff means to allege that the plaintiff and defendants concurred as to such necessity, or that the same were in fact necessary, or how necessary.

The cause was argued in the court below by *G. L. Mowat*, for the demurrer; and *B. M. Britton*, contra, and the following judgment pronounced:

MCKENZIE, J.—I am of opinion that the declaration is sufficient, and that the plaintiff is entitled to the judgment of the court.

By the award declared upon the defendants are ordered to pay to the plaintiff one-fifth part of all expenses that might be necessarily incurred by him after the first day of October, in renewing or repairing a certain water-wheel, flume, bulk-head, dam, or any other expenses that might be incurred for the mutual benefit of the plaintiff and the defendants, and that the plaintiff should have the right to say what repairs should be done, and render to the defendants monthly accounts, properly vouched for, of the expense of such repairs, and that within one month from the time of rendering such accounts the defendants should pay one-fifth of the amount thereof to the plaintiff.

There is no claim made by the plaintiff on this part of

the award, but the plaintiff contends, and I think justly, that the time and manner of rendering an account, and the mode and proportion of payment for the work contemplated by the second branch of the award, are regulated by the first. By the second part of the award it is ordered, that should it be necessary for the mutual benefit of the plaintiff and defendants to put in a new wheel, flume, and bulkhead, or any of them, before the first day of October, then that the defendants should pay one-fifth of the expense incurred, upon an account for the same being rendered to the defendants, and vouched for *as was before stated* in said award, *as hereinbefore stated*, for their proportion of future repairs. It is admitted by the demurrer that it was necessary for the mutual benefit of the plaintiff and defendants to put in a new wheel, flume, and bulkhead, before the first day of October, and that the plaintiff proceeded to put in the same, as by the award he might do, and that in accordance with the award a monthly account of the expenses for the same, so far as they were incurred during the month of August last, properly vouched for, amounting to the sum of \$888.93 in the whole, was duly rendered to the plaintiff.

I can attach no other meaning to the above connecting words "was before stated," and "as hereinbefore mentioned for the proportion of future repairs," than that they point out that the expenses incurred in putting in a new wheel, flume, and bulkhead, should be paid in the same proportion, after the expiration of one month from the time of rendering an account of them, as expenses incurred in making repairs would be paid. The direction of the award as set out in the declaration is that the defendants shall pay one-fifth of the expenses incurred, not one-fifth of the expenses in gross when completed. What sense would there be in furnishing monthly accounts, if the defendants would not be liable to pay their one-fifth until the whole work should be completed? The evident object of furnishing a monthly account is to ascertain the exact amount or share the defendants would have to pay as the work progressed. I think, therefore, that the plaintiff is entitled to recover upon the present declaration one-fifth of the expenses incurred during the month of August last,



in proceeding to put in a new wheel, flume, and bulkhead, the account thereof having been properly rendered and vouched for.

I cannot see how the language of the award and declaration could be construed to carry out the views urged by the defendants, namely, that the defendants' share of the expenses of the work could not be recovered from them until the entire work necessary to put in the new wheel, flume, and bulkhead should be completed. The necessity for putting in the wheel, flume, and bulkhead, before the first day of October, is alleged in the declaration in the very words of the award, and I think that is sufficient. The award has conferred the right to say what repairs should be done for the mutual benefit of the plaintiff and defendants upon the plaintiff in express terms; and by implication, and relation of words, I think the award invests him with the same right touching the putting in of the new wheel, flume, and bulkhead; and the averment that "the plaintiff proceeded to put in a new wheel, flume, and bulkhead, as by said award he might do," is sufficient to relieve the declaration from the ambiguity and uncertainty urged by the defendants at the argument, and stated in the margin of the demurrer. On the whole, I think that the judgment of the court should be for the plaintiff on the demurrer.

From this judgment the defendant appealed.

*Blake* for the appellant.

*Britton* for the respondents, cited *Bradford v. O'Brien*, 6 U. C. R. 417; *Kemble v. Mills*, 1 M. & Gr. 757; *Davis v. London and Blackwall R. W. Co.*, *Ib.* 801; *Stephen on Plg.* 310, 312.

ROBINSON, C. J., delivered the judgment of the court.

We concur in the opinion given by the learned judge of the county court upon the construction of this award, and the reasons for his judgment are so fully and clearly stated that we do not desire to add any thing to them, but to say that it appears to us quite reasonable to suppose that the arbitrators did mean what the plaintiff in bringing this

action assumed they did, and that if they meant their award to be taken in any other sense, they should not have expressed themselves in the terms they have done.

We think the appeal must be dismissed with costs.

Appeal dismissed with costs.

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MARTIN V. CLARK.

*Covenant—Pleading—Set off.*

The declaration stated that by indenture one W. G. mortgaged to the plaintiff and two others, as trustees of S., his unexpired term in certain lands, to secure the payment to said trustees of £400, and interest, which he thereby covenanted to pay at certain times specified: that said W. G. also by indenture mortgaged said term to the plaintiff, to secure the payment to him of £226 7s. 6d.: that under a power of sale in said last mentioned indenture the plaintiff duly sold the mortgaged premises to defendant at the following price—that is to say, that defendant should pay the mortgage to said trustees, and pay £150 to the plaintiff: that the plaintiff thereupon, in consideration of such price to be paid, assigned said premises to defendant, and defendant by the indenture of assignment covenanted with the plaintiff to perform the covenants in the mortgage to said trustees; and the plaintiff alleged that defendant had not paid the price so to be paid by him for his said purchase, and had broken his covenant, in this, that although the last instalment of the mortgage money payable to the trustees was due and unpaid, yet defendant had not paid the same.

Defendant pleaded, 1. As to so much of the declaration as relates to the price or sum of money to be paid by defendant to plaintiff, that he did not promise as alleged. 4. As to so much as relates to said price, a set-off for moneys due by plaintiff to defendant. 5. As to so much as relates to the plaintiff's claim in respect of the mortgage from W. G. to the trustees, a similar set-off.

*Held*, on demurrer, pleas bad, for the first was not a denial of the covenant sued upon, but an attempt to put in issue its legal effect: the fourth and fifth were pleaded to a cause of action not advanced, as the declaration was for the non-payment of money to the trustees, not to the plaintiff; and as to the fifth plea, the claim under the covenant to pay the trustees was not one to which a set-off could be pleaded.

DECLARATION.—That by indenture dated the 1st of February, 1857, made between William Gilchrist, of, &c., of the first part, and Hugh Moore, of, &c., Richard Martin, of, &c., and the plaintiff, trustees of John Stinson, a minor, of the second part, said William Gilchrist mortgaged to said trustees, as such trustees, his, said William Gilchrist's, then unexpired residue of a certain term of years, commencing on the 1st of April, 1855, and extending for and during the full and complete term of ten years thence next ensuing, (which said William Gilchrist held by virtue of a certain indenture of

lease, dated the 1st of April, 1855, and made between Nathan Brice, of, &c., of the first part, and said William Gilchrist of the second part thereof,) of and in a certain parcel of land in the City of Hamilton, in the County of Wentworth, described as, &c., to secure the payment to such trustees of £400 of their trust property, then borrowed by said William Gilchrist, in manner following: that is to say, £100 thereof, with interest on the whole sum remaining unpaid at each time of payment, on the first day of November in each and every year, until the said principal sum of £400 should be fully paid and satisfied, without any deduction; and said William Gilchrist also, in and by such indenture of mortgage, covenanted to and with such trustees, to duly pay or cause to be paid unto them the said sum of £400, together with interest for the same, at the time and in the manner thereinbefore appointed for that purpose, as aforesaid. And the said William Gilchrist also, by indenture made between him and the plaintiff, mortgaged the said term of and in the said demised premises to secure the re-payment to the plaintiff of another sum of £226 7s. 6d., (then due by the said William Gilchrist to the plaintiff,) with interest, within a certain time therein in that behalf specified; and also to secure the payment to the plaintiff of all further advances and sums the plaintiff might make to the said William Gilchrist, or might become security or liable for, for or on behalf of the said William Gilchrist, with interest upon all sums over due, and a fair commission for managing the business, which indenture contained a power of sale to the plaintiff of such mortgaged premises, and all the right, title and interest of said William Gilchrist therein, to be exercised in a certain manner and form, and upon the performance of certain preliminaries therein in that behalf specified, in case the said William Gilchrist should make default in payment thereof to the plaintiff as therein specified; that afterwards the said William Gilchrist made default in that behalf, and thereupon the plaintiff, having performed all such preliminaries in the manner and form so prescribed, and with the knowledge and consent of the said William Gilchrist to the hereinafter next mentioned sale



thereof, sold the said mortgaged premises to the defendant under and by virtue of the said power of sale, and for such default of payment of such mortgage money and interest to the plaintiff by said William Gilchrist to such defendant, at and for the following price: that is to say, that the defendant should pay off and satisfy the said mortgage to the said trustees, and also pay to the plaintiff £150 of lawful money of Canada; and thereupon, in execution of such sale thereof by the plaintiff to the defendant, and such purchase by the defendant thereof from the plaintiff, the plaintiff, by indenture dated the 19th of August, 1857, and made between, and signed, sealed and delivered as their act and deed by, the plaintiff, of the one part thereof, and the defendant of the other part thereof, in consideration of such price so to be paid by the defendant as aforesaid, assigned, transferred, and set over unto the defendant, his executors, administrators and assigns, the said mortgaged premises, subject to the said mortgage to the said trustees, and all the said equity of redemption, estates, rights and interests of said William Gilchrist, in, to and concerning such mortgaged premises; and the defendant thereupon, in and by such indenture of assignment thereof to him, covenanted to and with the plaintiff to perform the covenants and agreements contained in the said lease from said Nathan Brice, and in the said mortgage so made by said William Gilchrist to such trustees as aforesaid; and the plaintiff says that he, the plaintiff, has well and duly performed all conditions precedent on his part to be performed concerning the premises, yet the defendant has not paid the said price so to be paid by him for his said purchase as aforesaid, and has broken his said covenant, in this, that although the last of such instalments of such mortgage money and interest so payable to said trustees as aforesaid, was before the commencement of this suit and still is wholly due and unpaid, yet the defendant neglected and refused to pay the same, or any part thereof—and the plaintiff claims £150.

*Pleas*—1. As to so much of the said declaration as relates to the supposed price or sum of money to be paid by the defendant to the plaintiff, that the defendant did not promise as alleged.

4. To so much of the said declaration as relates to the said price so to be paid by the defendant to the plaintiff, that the plaintiff at the commencement of this suit was, and still is indebted to the defendant in an amount greater than the plaintiff's claim, to wit, in the sum of £1000, for that the plaintiff on the 19th of October, 1856, by deed, covenanted with the defendant to pay to the defendant £2,500, with interest thereon, at the rate of six per cent. per annum, as follows, to wit, one-tenth part thereof in a promissory note, and the balance in ten equal annual instalments from the day and year last aforesaid, with interest on the unpaid principal at the time of each payment, half yearly; also, in the sum of £300 for money paid by the plaintiff for defendant at his request, money lent, money received, for interest, and on account stated.

5. As to so much of the said declaration as relates to the plaintiff's claim in respect of the mortgage from William Gilchrist to the said trustees, a set-off, as in the fourth plea.

*Demurrer*, on the grounds, as to the first plea, that the plaintiff's action is only for the breach of a specific covenant, which the defendant admits impliedly, so far as such first plea is concerned, by not denying, and does not in any way in that first plea object to having been liable thereupon: that such plea is bad, either for attempting to put in issue a wholly immaterial matter, or because the defendant is thereby attempting, after admitting for the purposes of that first plea his deed, and the legal effect thereof, as set out in the declaration, to submit that legal question for the court to a jury, as if it were a mere question of fact.

As to the fourth plea, that is not pleaded to the cause or any part of the cause of action in the declaration mentioned, but merely to a portion of the matters of inducement therein alleged; also, that the plaintiff in this action is merely suing for the breach of the defendant's covenant to pay to the trustees in the declaration mentioned the last of the instalments payable to such trustees upon the mortgage in the declaration in that behalf mentioned, and the defendant cannot by law plead such set-off as in that fourth plea is alleged to such breach, upon which the plaintiff is seeking, as in the

declaration mentioned, to recover only unliquidated damages; also, because set-off cannot be pleaded to such a breach of covenant, which is not for the payment of money to the plaintiff, but to others, namely, the trustees of the infant in the declaration mentioned; also, because the defendant in such plea attempts to set off a supposed debt not due at the time of pleading such plea, and also thereby attempts to set off mere unliquidated damages for not giving a promissory note.

And to the fifth plea, the same objections.

*Martin*, for the demurrer, cited Chy. Junr. Prec. 499.

*R. A. Harrison*, contra, cited Chy. on Plg., vol. i., p. 307-8; *Mountford v. Horton*, 2 N. R. 62; *Dearle v. Barrett*, 2 A. & E. 82; *Abbott v. Hicks*, 5 Bing. N. C. 578; *Collins v. Collins*, 2 Burr. 820; *Fletcher v. Dyche*, 2 T. R. 32.

ROBINSON, C. J., delivered the judgment of the court.

The first plea is no doubt bad. The defendant is sued upon no other promise than such as he is alleged to have made by covenant in the indenture executed between the plaintiff and him. He does not deny the making of such a covenant as is set out, but says that he did not promise as the plaintiff alleges, which is doing nothing more or less than referring to the jury a question upon the proper construction of the deed, which he has not denied. Then, besides, the plea has no relation to the cause of action on which the plaintiff is suing, which is not for the £150, or any other sum that the defendant covenanted to pay to the plaintiff, but for not having paid to the trustees the sums due to them upon the mortgage made to them by Gilchrist, which the defendant, according to the declaration, covenanted he would do.

It is one disadvantage of allowing pleadings to be so loosely framed, that it may be often uncertain for what the plaintiff is really suing, and the present declaration is an instance of that, for there is some colour for supposing that the plaintiff may have intended to claim in this action for the £150, which, according to the statement of the transaction between the defendant and him, was to be paid by defendant



as part of the price or consideration to be given by defendant for the land ; and we cannot say we are surprised that the defendant fell into the error of imagining that the action was brought in part for that, but we do not think that that is the most reasonable and obvious construction of the declaration.

On the contrary, it appears to us that the plaintiff is suing only for the single breach of covenant in not paying the last instalment due to the trustees upon Gilchrist's mortgage to them. The plaintiff in his causes of demurrer assigned does take the exception, we see, that the declaration contains no demand on any other account, and it could not after that be permitted to him to claim for the £150 payable to the plaintiff.

We think we must hold that the defendant in his first and fourth pleas is defending himself against a supposed cause of action which is not advanced by the declaration, and that those pleas are therefore bad.

The fifth plea is objected to on another ground. That plea goes to the alleged breach in not paying the money due to the trustees. It is expressly stated in the declaration that the defendant undertook to pay that money *to the trustees*, and though in setting out the defendant's covenant to the plaintiff, it is not repeated that the money remaining due on Gilchrist's mortgage was to be paid *to the trustees*, yet that must be inferred from the previous statement in the declaration of the terms of the sale to the defendant, especially as it was to them that the money was to go. This, then, was no case of mutual debts between plaintiff and defendant, but is like any other case of a plaintiff suing defendant for not indemnifying him or his estate against charges that may be brought by a third party, and in such cases a set-off is not pleadable.

The plaintiff is therefore entitled to judgment, we think, on all the demurrers.

Judgment for plaintiff on demurrer.

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## ARMSTRONG V. LITTLE AND HOUSTON.

*Ejectment—Notice under Consol. Stats. U. C., ch. 27, sec. 17—Estoppel.*

In an action of ejectment the plaintiff proved a paper title, but the grant from the Crown did not issue until 1826, and the deed from the grantee was executed in 1824. This deed was lost, and the memorial of it produced as secondary evidence shewed it to have been an ordinary conveyance in fee, but did not shew what covenants it contained. The plaintiff gave a notice under Consol. Stats. U. C., ch. 27, sec. 17, and defendants shewed no title.

*Held*, that the deed by the patentee should be presumed to have been one which would operate by estoppel, and that the statute applied.

EJECTMENT for lot 15, in the second concession of the township of Huntley.

The defendants appeared for the whole lot, though in fact they were only in possession of part of it.

The plaintiff claimed title, by the notice given with the writ of summons, by virtue of conveyances from the grantee of the Crown down to himself. The defendants, by their notice, besides denying the plaintiff's title, claimed to hold by length of possession.

The plaintiff also served the defendants with a notice under the 17th section of Consol. Stats. U. C., ch. 27.

The trial took place at Ottawa, before *Robinson*, C. J. The patent from the Crown to William Grant, for the whole lot, dated the 7th of February, 1826, was put in. The deed from Grant to John Hall was not produced. It was proved that this deed had been placed in the hands of a Mr. Harvey, a solicitor living in Ottawa, for the purpose of some proceedings being taken in reference to the land. Mr. Harvey left the province some years ago, leaving his papers in possession of Mr. Ford, of Brockville, who placed the same in possession of Mr. Scott, of Ottawa. It was proved that upon search made no trace of the deed could be found, and secondary evidence of it was admitted. The memorial of it was produced from the registry office of the county of Carleton, executed by Grant, the grantor, which purported to shew that William Grant, of the city of Montreal, in Lower Canada, gentleman, conveyed to John Hall, of the same place, hair-dresser, the land in question, by deed, dated the 8th of November, 1824. The memorial was of the same date, the affidavit of one of the wit-

nesses was sworn before one of the judges of the Court of King's Bench for the district of Montreal, on the same day, and the deed was registered in the county registry on the 28th of November, 1824. John Hall died in October 1828, in Montreal, leaving his son and heir-at-law, Archibald Hall, then about two or three years old. The family of the Halls, consisting of the widow, two daughters, and the son, Archibald, remained in Montreal until 1834, when they removed to the United States.

There was proved a deed, dated the 3rd of May, 1850, purporting to be made at Montreal, between Archibald Hall, of the city of Philadelphia, acting by his attorneys, Mack and Muir, of the city of Montreal, of the one part, and Samuel Falls, residing in the township of Huntley, of the other part, and to convey the land in question in fee to Samuel Falls. This deed, in the execution, did not express that it was made by Archibald Hall by the attorneys, but was signed by the attorneys in their own names, without saying that it was executed on behalf of any one. It was registered on the 6th of May, 1850. A notarial copy of the power of attorney under which this deed was executed was produced, dated the 5th of March, 1849, authorising the attorneys to sell and convey the land in question.

Next was proved a conveyance from Samuel Falls and wife to the plaintiff, dated the 12th of March, and registered on the 16th of March, 1860. Then a deed of bargain and sale in consideration of £125, was proved, from Archibald Hall to the plaintiff, dated the 30th of May, 1860, for the same land. This deed recited that he, Archibald Hall, had conveyed by deed, dated the 3rd of May, 1850, to Samuel Falls, and that Falls had by deed of the 12th of March, 1860, conveyed to the plaintiff. It contained a covenant by Archibald Hall for further assurance, to be executed when the plaintiff might deem the same necessary.

At the close of the plaintiff's case the defendants' counsel moved for a nonsuit on several grounds, of which the only one material to notice is, that the patent to Grant did not issue until the 7th of February, 1826, and the deed from him to



Hall was executed on the 8th of November, 1824: that there was no proof whether that conveyance contained covenants for title, or covenants for further assurance, the memorial registered not establishing it, and that there was nothing to shew that it could operate by way of estoppel.

The plaintiff relied upon his notice, given under the 17th section of the Consol. Stats. U. C., ch. 27, to compel the defendants to shew their title before they could sustain such an objection.

The learned Chief Justice overruled the defendants' objection, leaving them to move upon that ground if necessary.

The defendants gave no evidence of any title, and it was admitted they could not prove possession to defeat the plaintiff's title.

The learned Chief Justice left it to the jury to say whether they were satisfied with the proof that Archibald Hall was the heir of John Hall, and with the proof of the different conveyances, remarking that although more evidence might be given, yet in his opinion sufficient appeared to shew that the plaintiff was the true proprietor of the land.

The jury, however, found a verdict for the defendants.

*Richards*, Q. C., obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the grounds that the verdict was contrary to law and evidence, and perverse, and against the judge's charge. He cited *Rex v. Inhabitants of Morton*, 4 M. & S. 48; *Rex v. Inhabitants of Kenilworth*, 7 Q. B. 642; *Tay. Ev.*, sec. 400.

*Crombie* shewed cause.

BURNS, J., delivered the judgment of the court.

There is reason to believe that the jury in this cause either entertained an idea that the plaintiff had been speculating in making a purchase of the lot in question, and so that they would find against him; or that they determined in their minds not to be satisfied with the evidence on some of the points, so as to excuse their consciences from finding a verdict for the plaintiff. Another cause was tried immediately after this one on the same evidence and facts, for another portion of the same lot, and the second jury found a verdict for the plaintiff.

With regard to the heirship of Archibald Hall, no reasonable person ought to have doubted, upon the evidence adduced, that he was the son and heir of John Hall. Then with respect to the deed purporting to be executed by the attorneys of Archibald Hall to Samuel Falls, the case by no means depended upon the question whether that was or was not properly executed by the attorneys, for Archibald Hall himself executed a deed to the plaintiff on the 30th of May, 1860, and that deed is not merely a confirmation of the deed before made to Falls, but it is a deed of bargain and sale in consideration of £125. Archibald Hall was examined as a witness at the trial, and he proved that he agreed to sell the land to Falls for \$600, of which Falls paid him \$100, and a mortgage to secure the remaining \$500 was given. This \$500 was paid to him by the plaintiff when he conveyed to the plaintiff.

Then as to the objection made, that it does not appear that Grant's conveyance to John Hall was such that Grant himself, or his heirs, or any one claiming by or under him, would be estopped, the effect of the notice served by the plaintiff, under Consol. Stats. U. C., ch. 27, sec. 17, is to be considered. The defendants did not give any such evidence of title as shewed that they were persons legally entitled to the land, or *bonâ fide* claimed to be entitled by reason of the defect, if there were any, in the deed of Grant to Hall operating by way of estoppel. In the words of the 18th section, the first inquiry is whether the evidence was sufficient to satisfy the court and jury that the plaintiff was entitled in justice to be regarded as the proprietor of the land. It seems the learned Chief Justice was satisfied of that fact, though the jury perversely, as we think, thought otherwise upon some point unconnected with the one in question.

On considering the matter in connexion with the evidence, there can really be no reason to suppose that Grant did not believe that he had effectually conveyed the land to John Hall. The memorial of that deed, executed by Grant, tells us that it was a bargain and sale of the lot to John Hall, and his heirs and assigns for ever, and to their own proper use and benefit. The patent afterwards is found in the possession of the heir of John Hall, and produced by him

when he sells and conveys the land. The presumption therefore is in favour of the conveyance containing such terms as would enable it to operate by estoppel. The instrument not being produced, of course it is impossible to say whether there be or not the legal form wanting to shew a perfect legal title, but the production of that deed for the purpose is not indispensable, for if he cannot shew a perfect legal title by reason of or from causes not within the power of the plaintiff to remedy by using due diligence, he still may have the benefit of the provisions. Here the plaintiff shews that the conveyance itself cannot be found, and from the evidence we have we think it preponderates in favour of the conveyance being one which would operate by estoppel, and of that fact the jury ought to be satisfied.

If the court and jury both be satisfied that the plaintiff ought to be regarded in justice as the proprietor of the land, then is the case such as entitles the plaintiff to give the notice provided for in the 17th section? Are these defendants then to be considered intruders, having no claim or colour of legal claim to the possession? As to the first, no claim of any kind beyond that of mere possession was pretended, and as to the second, it was admitted by the defendants' counsel that they could not rely upon possession, for Hall and his heir at law were never in Upper Canada, so that the Statute of Limitations did not apply. In *Doe dem. Lyons v. Crawford*, (6 O. S. 344,) this court held that a person who had gained title by twenty years' possession could not be said to be a person having no colour of legal claim, and therefore he could not be prevented from taking advantage of either technical form in the title or imperfections appearing in the case. The present case is very different, for there is nothing to prevent the plaintiff from recovering but the bare supposition that possibly, if we saw the deed of conveyance from Grant to John Hall, it might be found that it was a deed which did not operate by way of estoppel.

No doubt the rule is that the plaintiff must recover by the strength of his own title, and not the weakness of his adversary's, but here the evidence shews that the plaintiff ought in justice to be regarded as the proprietor of the land, and the



presumption preponderates that it would prove to be legally so if we saw all, and the question is whether in such a case the 17th and 18th sections do not apply to prevent a failure of justice. We think they do, and that therefore the ruling of the Chief Justice was right, and the rule for a new trial should be made absolute.

Rule absolute.

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SCOTT V. JOHN CARVETH, DONALD MANSON, ROBERT  
MANSON, AND JOHN WHITE.

*Ships—Registration—Effect of Imperial Act, 17 & 18 Vic., chap. 104.—Sale of equity of redemption.*

The imperial act, 17 & 18 Vic., ch. 104, does not repeal altogether the provincial statute 8 Vic., ch. 5, but applies only to vessels proceeding to sea, and our statute remains in force as to all vessels navigating exclusively the inland waters of the province.

Where a mortgaged vessel had been sold under *fi. fa.*, and the purchaser brought replevin: *Held*, that he acquired no right, the equity of redemption not being saleable, and that the defendant must succeed on a plea denying the plaintiff's property, though he shewed no connexion with the mortgage.

REPLEVIN for the schooner called the "Defiance."

*Pleas*—1. That the schooner was not nor is the property of the plaintiff. 2. That the schooner was the property of the defendant Carveth, and not of the plaintiff, and that the defendant Carveth as the owner, and the other defendants as his servants, and by his command, took the goods as complained of.

The trial took place at Cobourg, before *Burns, J.*, and the facts of the case appeared as follow:—the Sheriff of the united counties of Northumberland and Durham had on the 26th of February, 1858, an execution against goods in his hands, in a suit of one William Ferguson v. Donald Manson, William Manson, and William Garnett. At that time the Mansons, or one of them, were engaged in building the schooner in question at Port Hope, and the vessel was then upon the stocks. Messrs. McLeod and McIntyre claimed the vessel by virtue of a bill of sale of her. The sheriff, at the instigation of Garnett, one of the defendants in the execution, proceeded to sell the schooner as Manson's property, and did sell her in the month of May, 1858. At

that sale, one Ulyott bid off the vessel, not for himself, however, but as an agent for Garnett. The defendant, Carveth and Ulyott joined Garnett in a bond to the sheriff, to indemnify him for selling the vessel. Messrs. McLeod and McIntyre sued the sheriff, the deputy sheriff, and Garnett, Ulyott, and Carveth, for the trespass in selling their property, and they finally obtained judgment on the 11th of April, 1860, for £888 9s. 3d. (a) In the mean time Garnett finished and rigged the vessel, and on the 9th of June, 1859, registered her at Port Hope, in his name, as owner, calling her the "Defiance." The custom-house officer granted a certificate of ownership, based upon the builder's certificate and declaration, all in the forms of and as if granted under the provincial statute, 8 Vic., ch. 5.

On the 10th of June, 1859, Garnett made a mortgage upon the schooner to James Falconer, to secure to him the payment of \$800, to be paid in six months from the date. This mortgage was duly registered in the custom-house at Port Hope, on the 11th of June, 1859, and duly entered the same day, upon the certificate of ownership. It appeared by the certificate of ownership, by an entry thereon made on the 18th of January, 1860, that James Falconer had, by bill of sale, by way of assignment, dated 16th January, 1860, assigned and transferred the mortgage to the defendant Carveth, but the defendants at the trial refused to put in or rely upon that assignment.

On the 11th of April, 1860, Messrs. McLeod & McIntyre sued out execution upon their judgment against the sheriff, the deputy-sheriff, Garnett, and Ulyott, directed to the coroner. Upon this writ the coroner seized the schooner as Garnett's property, and on the 2nd of May, 1860, sold her to the plaintiff as the highest bidder, for \$700. The defendant Carveth was present and forbade the sale.

The defendants contended that under the circumstances the coroner could not sell the vessel upon the writ of execution.

On the other hand, the plaintiff argued—1st. That the statute 8 Vic., ch. 5, was only to remain in force until the

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(a) See *McLeod et al. v. Fortune et al.*, 19 U. C. R. 98, 100.

imperial legislature passed an act applying to the inland waters of this country: that the imperial act, 17 & 18 Vic., ch. 104, (passed on the 10th of August, 1854,) in effect repealed the provincial act, and that the registration in this case not being according to the imperial statute, there was in truth no valid registration, and the coroner might sell the schooner as the property of either Garnett or Ulyott, he, Ulyott, having bid her off at the first sale, and the present execution being against them both.

2. Or if the vessel could be treated as a properly registered vessel, then that the coroner had a legal right to sell Garnett's equity of redemption; and as these defendants had shewn no title in themselves, they were to be treated as strangers and trespassers, and could not contest the plaintiff's right to recover in this action.

A verdict was taken for the plaintiff, subject to the opinion of the court.

*Cameron*, Q. C., for the plaintiff, cited *Ringham v. Clements*, 12 Q. B. 260; *O'Connor v. Marjoribanks*, 4 M. & G. 435; *Dirks v. Richards*, Ib. 574.

*Donald Bethune* and *C. S. Patterson*, for defendants, cited *Kitchen v. Irving*, 8 E. & B. 789; *Farrant v. Thompson*, 5 B. & Al. 828; *Scatcherd v. Equitable Fire Insurance Company*, 8 C. P. 415; *Isaac v. Belcher*, 5 M. & W. 139; *Chase v. Goble*, 2 M. & Gr. 930; *Freshney v. Carrick*, 1 H. & N. 653; *Newnham v. Stevenson*, 10 C. B. 723; *Owen v. Knight*, 4 Bing. N. C. 54; *Butter v. Hobson*, Ib. 290.

The statutes cited are referred to in the judgment.

BURNS, J., delivered the judgment of the court.

We are of opinion that the first objection made by the plaintiff's counsel, that the vessel in question in this cause is not to be treated as a properly registered vessel, is not entitled to prevail. The legislature of Canada, in 1845, clearly understood that the imperial act 3 & 4 Wm. IV., ch. 55, did not extend to vessels navigating the inland waters of this province, and therefore passed the statute 8 Vic., ch. 5,



under which act the vessel has been registered in 1859. The Merchants Shipping Act of the imperial parliament, 17 & 18 Vic., ch. 104, passed on the 10th of August, 1854, certainly repealed that of 3 & 4 Wm. IV., ch. 55, but did not repeal our provincial act; unless by implication, or by some provision contained therein necessarily overriding it. The 27th section of the provincial act provides for the act ceasing if at any time the act of the imperial parliament (3 & 4 Wm. IV., cited therein) "shall be extended to vessels navigating the inland waters of this province, *and not proceeding to sea.*" Now that act never has been extended, either by the imperial or provincial legislature, to such inland waters, but what has been done by the imperial parliament is to pass another act called the Merchants Shipping Act. The provision of the Consolidated Acts of Canada, ch. 41, sec. 27, is as follows: "that this act shall cease and determine as to any further registration under it, whenever the laws of the united kingdom for the registering of British ships are extended to vessels navigating the inland waters of this province, *and not proceeding to sea.*" These words cannot introduce an imperial act passed five years before.

The question therefore simply is whether the Merchants Shipping Act *per se* in effect repeals the provincial act. The provincial act does not profess to deal with any other vessels than such as navigate the inland waters of this province, and are not registered under 3 & 4 W. IV., ch. 55, by which we understand vessels not proceeding to sea. The 17th section of the Merchants Shipping Act extends part two, which is the part relating to the registry of British ships, to all her Majesty's dominions, but the 19th section shews, we think, very clearly, that British ships required to be registered for the purposes of that act were ships proceeding to sea. We gather no where in the act any language shewing that the imperial parliament intended to make any provisions for the inland waters of this province, but they were, as it appears to us, dealing with the general question of sea-going vessels, or such classes as have been specially mentioned, or where a particular locality is stated.

Looking at the imperial act in that light, it appears to us

there is nothing inconsistent in holding both acts to be in force, the imperial act as applying to sea-going vessels, and the provincial act as applying exclusively to vessels navigating the inland waters of this province. The vessel in the present case is registered as a vessel navigating the inland waters. When we look at the 30th section of the Merchants Shipping Act, to see who may or can register vessels, the 6th sub-section is the only part which would apply, and there it appears that the persons upon whom the duty of registering would fall must be approved of by the commissioners of customs for the registry of ships, and if there be no such officer, then by the Governor or person administering the government. We never heard of any suggestion that the different custom-house officers situated at the ports upon the inland lakes were or required to be sanctioned by the commissioners of her Majesty's customs in the United Kingdom. The 31st section provides for the Governor or person administering the government performing any act or thing relating to the registry of a ship, occupying the places of the commissioners of customs; but all these provisions we look at as applying to sea-going vessels, and we know that in the river St. Lawrence many ships are built intended for that purpose. If it be said that, in case of a vessel going from lake Ontario to the sea, in the event of holding that both acts are in force she would require to be doubly registered, we think the answer to that is contained in the 98th section, for in such case a pass granted by the commissioners of customs, or by the Governor, would enable the vessel to go any where within the limits mentioned in the pass. The words in the clause, "*without being previously registered,*" we read to mean not having been registered under that act, thus leaving untouched any provincial requirements in respect of registry or otherwise.

Then as to the second point. The coroner did not sell merely the equity of redemption of Garnett, but he sold the vessel, and the plaintiff bought her as the highest bidder, and then he claims the right of possession. The plea denies the plaintiff's right of property. The case of *Kitchen v. Irving*, 8 E. & B. 789, as remarked upon by me in *Bethune v. Cor-*

bett, (18 U. C. R. 498,) shews that the plaintiff did not acquire a legal title to the vessel under the coroner's sale so long as the mortgage to Falconer remained unsatisfied and a registered charge upon her. The plaintiff contends that the defendants cannot set up the outstanding mortgage to defeat him, unless the defendants go further and connect themselves with the mortgagee, which they did not do. Com. Dig. "Pleader," 3 K. 11 and 12, shews that the defendant may deny the plaintiff's property. See also *Dover v. Rawlings*, (2 M. & Rob. 544). The first plea of the defendants denies the plaintiff's property in the vessel. At the trial the plaintiff did not rely upon possession previous to the defendants' taking her, but he relied upon establishing a legal title to the vessel, that is, to the possession of her; and the evidence failed to establish any legal right, and therefore the defendants were entitled to a verdict upon the first plea.

Judgment for defendants.

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### THE SAME CASE.

#### *Appeal—Application to stay proceedings.*

The defendants having succeeded in replevin brought against them for a schooner, the plaintiff served notice of appeal, and applied to stay proceedings for a month to perfect his security, so that the defendants might not in the meantime obtain a return of the vessel. The court, however, refused to interfere.

The foregoing judgment having been given on the 9th of February, on the 13th the plaintiff served notice of appeal on the defendants' attorney, and on the same day *Hector Cameron*, for the plaintiff, moved the court to stay proceedings for one month, to enable the plaintiff to perfect the requisite security; and that the court should direct what security should be given for the return of the vessel; or that a receiver should be appointed.

The schooner "*Defiance*," replevied, was sworn in the plaintiff's affidavit to be worth £750, and replevin bonds were taken in three times that sum.

The plaintiff desired to prevent defendant from entering up judgment and suing out a writ *de retorno habendo* before



he could complete his security for appeal, and therefore asked for the delay. His attorney swore that the appeal was *bonâ fide*, not for delay.

*C. S. Patterson* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We do not think that there is any reason why we should interfere with the ordinary course of proceeding in regard to the giving security in this case, or make any order respecting the custody of the vessel.

Rule discharged.

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### BUCK v. HUNTER.

*Notice of action—Consol. Stats. U. C., ch. 19, sec. 193.*

A notice of action given to a division court bailiff under Consol. Stats. U. C., ch. 19, sec. 193, stated that the writ would be sued out of the county court of the county of Brant, and the plaintiff afterwards brought his action in the county court of Wentworth.

*Held*, affirming the judgment below, that the notice was insufficient.

This was an appeal from the county court of the county of Wentworth.

The only question brought up by it was, whether the notice of action which was served upon the defendant, a bailiff in the division court, was sufficient under the Statute, Consol. Stats. U. C., ch. 19, sec. 193. It was objected at the trial that it was insufficient, but the learned judge overruled the objection when taken as ground of nonsuit, reserving leave, however, to the defendant to renew his objection in term, and a verdict was given for the plaintiff for \$120.

A rule *nisi* was afterwards granted, which was made absolute for a nonsuit, and this judgment was appealed from.

The only objection taken to the notice of action was, that it stated that at or soon after the expiration of one calendar month from the service of the notice, the plaintiff would "cause a writ of summons to be sued out of Her Majesty's county court of the county of Brant" against the defendant, &c., whereas the suit was afterwards commenced, not in the county of Brant, as the notice stated it would be, but in the county of Wentworth.

*E. B. Wood*, for the appellant, cited *Jones v. Bird*, 5 B. & Al. 837; *Howard v. Remer*, 23 L. J. Q. B. 62; *Connolly v. Adams*, 11 U. C. R. 327; *Gillespie v. Wright*, 14 U. C. R. 52; *Upper v. McFarland et al.*, 5 U. C. R. 101; *Bross v. Huber*, 18 U. C. R. 288.

*M. C. Cameron*, contra, cited *Croukhite v. Sommerville*, 3 U. C. R. 129.

ROBINSON, C. J., delivered the judgment of the court.

The provision of the statute, Consol. Stats. U. C., ch. 19, sec. 193, is, that "any action, or prosecution against any person for any thing done in pursuance of this act, shall be commenced within six months after the fact was committed, and shall be laid and tried in the county where the fact was committed, and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action."

In the case of *Bross v. Huber*, (18 U. C. R. 288,) this court held a notice of action insufficient which had been given to a justice of the peace, because, instead of stating positively in which court the action would be instituted, it stated that a summons would be sued out of "the Court of Queen's Bench, or Court of Common Pleas at Toronto." The defect of that notice was its want of certainty, the doubtful character of the information which it gave. This action was afterwards brought in one of the courts named. The defect in this action is in reality of a graver kind, for it states what was not true, and it was therefore calculated to mislead.

But it is true, on the other hand, as Mr. Wood remarked, that the statute under which the notice in *Bross v. Huber* was given does expressly require, among other things, that the cause of action, "and the court in which the same is intended to be brought, shall be *clearly and explicitly stated*" in it, while the statute which the plaintiff in the case before us had to comply with does not in any terms exact that the notice shall state in what court the action shall be brought.

If this notice had given no information whatever in regard to the court in which the action would be brought, there would be less difficulty in holding it to be sufficient, though it

is usual in all these notices to state the court in which the plaintiff intends to sue. But here the plaintiff has given incorrect information on a point on which the statute does not expressly require that he should have given any, and we cannot say that we think the learned judge was wrong in holding it bad, on account of its tendency to mislead. It is true, as he observed, that in consequence of the error notice of this action, which has been brought in the county of Wentworth, was not given.

It is material too to consider that the main object of the notice is to give to the defendant an opportunity to tender amends. Now the same 193rd clause, which directs notice to be given, provides also that the action shall be laid and tried in the county where the fact was committed. When the plaintiff therefore gave this notice of an action to be brought in the county court of Brant, he gave notice of an action which the defendant may have known or may have been advised could not be successful, and that might in any such case have made the defendant feel safe in omitting to tender amends before action.

We do not think we can properly reverse the judgment.

Appeal dismissed.

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### PROSSER V. HENDERSON.

*Landlord and tenant—Acceptance by telegraph—Subsequent entry—Commencement of rent.*

A. living at Collingwood wrote to B. at Toronto, on the 5th of July, 1859, to the effect that he would give £40 a year for his house and pay taxes, adding, if you agree telegraph at once to that effect, and I will take it. On the 6th B. telegraphed: "You may have the store for one year on terms of your letter." A. obtained the key from the former tenant on the 11th, and first entered on that day.

*Held*, that there was a perfect demise: that the rent commenced from the acceptance by B. of A.'s offer, not from the time when A. entered; and that B. was therefore entitled to distrain for a year's rent on the 7th of July, 1860.

REPLEVIN for goods distrained for rent.

*Pleas* 1.—*Non tenuit.* 2. No rent due.

At the trial, at Barrie, before *McLean, J.*, it appeared that the distress was made on the 7th of July, 1860, for a year's rent, at £40, claimed to have fallen due the day before.



The defendant put in and proved a letter from the plaintiff to him, dated 5th July, 1859, in which the plaintiff, living at Collingwood, wrote to defendant at Toronto, as follows: "In the present state of your house, considering the expense I shall have to be at to make it what it should be, I do not feel inclined to give more than £40 for a year, I to pay the taxes. If you are willing to let me have the house on those terms, and will telegraph at once to that effect, I will take it, otherwise I beg to decline it."

On the 6th of July, between noon and one o'clock, the defendant telegraphed from Toronto. "You may have the store for one year on terms of your letter."

There had been a tenant in the house, named Anderson, but he had removed from it before this correspondence took place, leaving, however, a few articles of trifling value in the house. Anderson had gone into another tenement, leaving this house locked. The key was got from Anderson on the 11th of July, and given to the plaintiff, who first entered on that day, and Anderson at once took away the few old things he had left in the house, a tin stove and some bonnet frames. The learned judge held that the term commenced on the 6th of July, when the plaintiff received defendant's acceptance of his offer, and the jury on that direction found for defendant.

*McMichael* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection. He cited *Bayley v. Fitzmaurice*, 8 E. & B. 664; *Dunk v. Hunter*, 5 B. & Al. 322.

*Patton* shewed cause, and cited *Doe Pearson v. Ries*, 8 Bing. 178; *Bundy v. Johnson*, 6 C. P. 221; *McClenaghan v. Barker*, 1 U. C. R. 26; *Chapman v. Bluck*, 4 Bing. N. C. 187; *Tompkins v. Pincent*, 1 Salk. 141; *Co. Lit.* 46 b; *Potter v. Sanders*, 6 Hare 1; *Dunlop v. Higgins*, 12 Jur. 295.

ROBINSON, C. J., delivered the judgment of the court.

We granted a rule *nisi* as moved, being doubtful whether the term could be held to have commenced till the plaintiff entered on the 11th of July, and consequently whether defend-

ant was not in too great haste to distrain for the year's rent. Admitting, which is not disputed, that the acceptance could be signified, as it was, by telegraph so as to bind the party, the first question is, did the letter with the answer by telegraph form a demise.

The letter is in effect this, "I will give £40 for your house for a year, and will pay the taxes. If you agree telegraph at once to that effect, and I will take it."

The answer is, "You may have it for one year on terms of your letter." There is here a subject of demise about which there is no dispute, though the letter calls it a house, and the message in answer calls it a store. We have also a certain rent and a specified term, one year.

This we think is a demise, perfected by entry, which shewed that the tenant so considered it, and had no new terms to propose. It is more than an agreement about a letting.

Then the only question is, when did the rent commence—with the acceptance of the tenant's offer, or when the tenant entered. We think it commenced when the acceptance completed the demise, and that on the tenant afterwards entering the rent would be taken to have commenced on the day when he was at liberty to enter, from which day the house must be considered to have been held at his disposal; and that he could not delay the commencement of rent by delaying to go into possession. The case of *McLeish v. Tate* (Cowper 782) we think is a decision to that effect, though it is not a very satisfactory case taken altogether. The court did in that case hold that in a case where there was something yet to be done by the landlord, which was necessary to complete the demise, that when that was done the subsequent agreement should by relation operate to make it a reservation of the rent from the beginning.

We think the rule should be discharged.

Rule discharged.

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THE MUTUAL FIRE INSURANCE COMPANY OF PRESCOTT V.  
PALMER, DAVIS, AND MOORE.

*Action against principal and surety—Competency of principal as witness—Want of seals to bond—Defence without merits—New trial refused.*

In an action on a bond against principal and sureties for the due performance by the principal of his duties as agent to the plaintiffs, alleging the non-payment of moneys received :

*Held*, that the principal was clearly a competent witness for the plaintiffs to prove the amount of his defalcation; and that on the authority of *Lamb v. Teeter*, 18 U. C. R. 304, his evidence for defendants on other points was rightly rejected.

It appeared that defendants having signed the bond left in a hurry without having it properly sealed, which was afterwards done, but it was clear that they knew it to be a bond, and it was stated on the face of it to be under seal. The jury having found against this defence the court refused to interfere, holding it not one to be favoured.

The plaintiffs sued on a bond, made on the 22nd of July, 1858, by the defendants, binding themselves jointly and severally to the plaintiffs in \$1000, with a condition that if Palmer, one of the defendants, who had been appointed an agent of the plaintiffs, should faithfully account for and pay over to the company all moneys that should be paid to him belonging to the said company, and should in all things faithfully and honestly discharge the duties of an agent of the plaintiffs, agreeably to the by-laws, rules and regulations of the said company, then the obligation should be void, &c.

*Breach*, that from the 22d of July, 1858, to the 1st of July, 1860, Palmer continued to act as the plaintiffs' agent : that large sums, to wit, to the amount of £250, were received by him as such agent on the plaintiffs' account, and that though requested he had wholly neglected and refused to pay the same over, whereby the obligation had become forfeited.

Pleas by Palmer. 1. *Non est factum*. 2. Traversing the alleged default, and pleading performance generally. 3. Payment. 4. Set-off.

Pleas by defendant Davis. 1. *Non est factum*. 2. Performance of the condition by Palmer.

Pleas by defendant Moore. 1. *Non est factum*. 2. General performance by Palmer.

At the trial, at Toronto, before *McLean*, J., a verdict was found for the plaintiffs for \$379.70.



*M. C. Cameron*, on behalf of the defendant Moore, moved for a rule *nisi* on the plaintiffs, and on the defendants Palmer and Davis, for a new trial for all the defendants, or for defendant Moore, on the law and evidence, and for misdirection, for the admission of improper evidence, and for rejection of legal evidence. The complaint of misdirection was in directing the jury that there was evidence to prove that defendant Moore had sealed the bond sued on, or given any one authority to seal it for him. And the other grounds were that the application for insurance put in at the trial, though not delivered to the company till after the dismissal of Palmer, was not legal evidence as against the surety of the receipt by Palmer of money on the plaintiffs' account; and that the learned judge was wrong in allowing Palmer to be sworn as a witness against the sureties, because if his admission after his dismissal could not be received, his evidence against the sureties could not be received. And that Palmer's evidence for the defendant Moore was improperly rejected after he had been produced and sworn on behalf of the plaintiffs, and he was improperly rejected as a witness on any point except those on which he had been examined by the plaintiffs. The rule was moved also on affidavits.

The facts sufficiently appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We do not think that the defence is at all to be favoured which was set up on the ground that the bond was not sealed by the defendants, for that the seals which stand opposite to the signatures of two of the defendants were not affixed at the time of their signing, but were put on afterwards. We should not grant a new trial upon the statements contained on that point in the affidavits filed, for it is quite clear that the defendants all knew and understood that it was a bond which they were required to execute; and they signed the instrument, which stated on the face of it that it was sealed with their seals.

It is obvious that they intended it should be sealed, though they left in a hurry, without seeing that requisite properly complied with. And as to Moore, who is the defendant

moving against the verdict, he wrote to the plaintiffs afterwards in such terms as admitted his liability as a surety, and may be fairly taken as recognising the authority of the person who affixed the seal to do so for him.

Then as to the ground that Palmer's evidence was improperly rejected, when the defendant Moore desired to elicit from him on cross-examination that when Moore signed the bond he did not seal it, the learned judge reports that in that he governed himself by what had formerly been decided in this court, in *Lamb v. Ward and Teeter*, (18 U. C. R. 304.)

It is complained also that Palmer should have been allowed to prove, as a witness for the plaintiffs who called him, the amount of his own defalcations while serving the plaintiffs as their agents, but he was clearly a good witness for that purpose. No one could know better what the fact was in that respect, and though his verbal admissions or declarations, not on oath, could not be binding on the sureties, that proceeds on a principle that does not at all interfere with his competency as a witness to prove on oath upon the trial the extent of the claim which the plaintiffs had against him by reason of his misapplication of their moneys. He was a perfectly good witness for that purpose, and besides, the amount for which he was in default seems to have been clearly ascertained before the action was brought, to the satisfaction of Moore and his attorney.

Rule refused.

## THE CANADA WEST FARMERS MUTUAL AND STOCK INSURANCE COMPANY V. MERRITT AND NICHOLLS.

*Bond by sureties—Construction—Liability for past defaults.*

Upon a bond conditioned that one J. should pay to the plaintiffs monthly and every month during the time for which he should act as their agent, all moneys which he then had received, or which he should receive for premiums, &c., and should repay to the applicants all moneys which he had then received or should receive for insurances not accepted by the plaintiffs, and should in all things well and faithfully conduct himself as their agent: *Held*, that the sureties were liable only for moneys received after the execution of the bond.

This was an action on a bond given by the defendants, conditioned that if Jarvis (who was at the time of executing the bond, 3rd April, 1858, and had been for two years or more before, agent of the plaintiffs) “should pay to the plaintiffs, or to their certain attorney, successors or assigns, monthly and every month, during the time for which he should act as their agent, all moneys which he then had received, or which he should receive, for premiums or applications for insurance, or otherwise, for the use of the said company; and should refund and repay to the applicants, or persons entitled to the same respectively, all sums of money which he had then received or should receive for premiums for insurance not accepted by the said company, and also should in all things well and faithfully conduct himself as the agent of the said company in all things required of him as such, then the said writing obligatory should be void.”

And the plaintiffs assigned as a breach that while the said Jarvis was in the service of the said company as their agent as aforesaid, he received for and on account of the said company divers sums of money, for premiums on applications for insurance and otherwise, for the use of the said company, amounting in the whole to £82 12s. 2d., yet that he did not pay the same monthly and every month, according to the said condition, to the said company, although requested by them so to do, whereby the said bond became void, &c.

*Pleas 1.*—That the bond was obtained by fraud of the plaintiffs.

2. Payment by Jarvis, after the making of the bond to the



plaintiffs, monthly and every month, of all moneys that he received for and on account of the plaintiffs, according to the condition of the said bond.

3. That the plaintiffs fraudulently concealed from defendants the fact that Jarvis was in arrear for moneys received by him before the making of the bond, and procured defendants by fraudulent representations and by concealment to execute the bond.

At the trial, at Hamilton, before *McLean*, J., no evidence was given of any default by Jarvis subsequent to the making of the bond, except as to £6 15s.

The pleas setting up fraud were by no means proved, but the evidence of any default by Jarvis was in regard to moneys received by him before the defendants became his sureties, with the exception of the small sum of £6 15s., which it appeared he received afterwards, and did not pay over.

It being assumed at the trial that the sureties, according to the condition of the bond, were liable for the amount which the principal had received before they became his sureties, as well as for moneys which should come into his hands afterwards, a verdict was rendered for the plaintiffs for £92 10s. 10d.

*Start* obtained a rule *nisi* for a new trial for misdirection. He cited *Railton v. Matthews*, 3 Bell's Scotch Appeal Cases 56; *Smith v. Bank of Scotland*, 1 Dow 272; *Smiton v. Miller*, Ross on Commercial Law 42; *Cashin v. Perth*, 9 Grant Chy. Rep. 340.

*Freeman*, Q. C., shewed cause, and cited *Belford Union v. Patteson*, 11 Ex. 623; *Wythes v. Labouchere*, 3 DeG. & Jones 593.

ROBINSON, C. J., delivered the judgment of the court.

Upon consideration of the terms of the surety bond we are of opinion that the sureties do not undertake by it to pay moneys that had been received and were unaccounted for before they became sureties, but only for future defaults.

That is the intention and purpose of such bonds in general, and though it is possible that sureties may in any par-

ticular case have consented to become liable for past defaults, yet it is so little likely that they should intend to do so, that the terms of their undertaking ought to be such as to make it clear that they did mean to incur that liability.

We think that this bond does not import this, but the contrary. The defendants, when they found that the bond was attempted to be enforced against them according to that construction, resisted it, and they have put pleas on the record to the effect that they were deceived in obtaining from them a bond that can make them liable for past defaults. We do not think that the evidence can be taken to have established fraud in the plaintiffs in the view of a court of law, whatever a Court of Equity might hold in such a case; but thinking, as we do, that the sureties are only liable on the bond, according to the terms of the condition, for future and not for past defaults, it follows that in our opinion the plea of payment was established, except as to the small sum of £6 15s. received after the defendants became sureties. If the plaintiffs assent to reduce the verdict to that amount this rule will be discharged, otherwise we grant a new trial without costs.

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### TORPY V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

#### *Collision—Action by servant of contractor—Liability.*

*Declaration*, that the plaintiff was a servant in the employment of one K., a contractor with defendants for keeping their road in repair: that in performing said repairs certain carriages and engines, under the management of defendants' servants, were used to transport materials and convey workmen employed by K.: that the plaintiff, being one of such workmen, became a passenger in one of these carriages to be carried from his place of work to his residence; that it was defendants' duty to use proper care in the management of said train, but by their negligence it came into collision with another train, whereby the plaintiff was injured.

*Held*, sufficient to shew defendants liable.

The plaintiff sued for an injury received by him while he was being carried in a railway train along the defendants' railway from Toronto to Stratford, by collision with another train of the defendants coming from Stratford to Toronto.

The declaration contained two counts. In the first count the plaintiff stated that he was a passenger in a railway train

of the defendants, to be carried, for reward to be paid to them, from Toronto to Stratford.

To this count the defendants pleaded that the plaintiff was not a passenger in one of the said railway cars of the defendants, to be by them safely carried for certain good consideration to the defendants in that behalf, as in the declaration alleged.

In the second count the plaintiff set forth that he was a servant in the employ of a contractor, to wit, William Kingsford, with the defendants, for keeping certain parts of their railway in repair, and in performing the works necessary for the said repairs certain carriages and engines, under the guidance and management of the defendants' servants, were used for the transport of materials, and the conveyance of the workmen employed by the said contractor, the said workmen not being the servants of the said defendants, to and from their boarding-house and to and from the place of their work; that the plaintiff so being a workman in the employment of the said contractor, to wit, on the 19th of April, 1860, became and was a passenger on a carriage drawn and propelled on and along the said railway by a locomotive engine, under the management and guidance of servants of the defendants, to be carried from the place of his work, to wit, Toronto, to the place where he boarded and lodged, to wit, Stratford; and it then became and was the duty of the defendants, by their said servants, to use due and proper care and skill in and about the carrying and conveying the plaintiff as aforesaid, and the management of the said carriage and locomotive, and other carriages and locomotives on the said railway, so as not to injure the plaintiff; yet the defendants not regarding their duty in that behalf, to wit, on the day and year last aforesaid, did not by their said servants use due and proper care and skill in and about the carrying and conveying the plaintiff as aforesaid, and the management of their trains as aforesaid; but then took so little care, and so negligently and unskilfully conducted themselves in and about the carrying and conveying the plaintiff, and in the conducting, managing, and directing the train to which the carriage was so attached in which the plaintiff was as afore-



said, and a certain other train on the said railway approaching the said train on which the plaintiff was, that by reason of such negligence and want of care and skill, the said train in which the plaintiff was and the said other train came into collision, and the plaintiff was thereby thrown violently against the bottom and sides of the said carriage, and against the ground, and was thereby then grievously bruised, &c.

To this count the defendants demurred, assigning as grounds of demurrer,—1. That the said count does not allege any facts from which the damage alleged would arise. 2. That there is nothing alleged in the said count which would give the plaintiff a right to be carried by the defendants, nor does it appear that the plaintiff was a passenger either for hire or reward to be paid by the defendants, or for any consideration to the defendants whatever, nor does it even appear that the plaintiff was on the car with the consent of the defendants. 3. That it is not alleged that the defendants' servants were acting in any way in the ordinary course of their employment, so as to render the defendants liable for their negligence.

Upon the trial of the issue on the defendants' plea to the first count, which took place in Toronto, before *McLean, J.*, the facts were proved to be just such as were stated in the second count, and it was agreed at the trial between the parties that if the plaintiff should fail upon the demurrer to the second count, a verdict should be entered in the defendants' favour on the first count, so that they should have judgment on the whole declaration. On this understanding the jury were directed to assess the damages which they found the plaintiff entitled to, if he should be held entitled to recover.

It was proved that the accident arose from a mistake of the conductor from Toronto.

There had been a change lately made in the times of running, and he had unfortunately forgotten it, and so was out of time, and was met by the down train at a point where he had no business to be. They were both freight trains. Several men were hurt, and one killed.

The plaintiff was less injured than any of the others, having his ankle a little strained, which troubled him for a few

days. The company paid the doctor who attended him, and paid all the men 4s. per day while they were disabled from working.

The jury gave a verdict for the plaintiff, and \$75 damages.

*Anderson* obtained a rule *nisi* to enter a nonsuit, which was argued at the same time as the demurrer. He cited *Degg v. Midland R. W. Co.*, 1 H. & N. 773.

*McMichael*, for defendants, cited *Great Northern R.W. Co. v. Harrison*, 10 Ex. 376; *Collett v. London and North Western R. W. Co.*, 16 Q. B. 984.

ROBINSON, C. J., delivered the judgment of the court.

As to the first cause of demurrer assigned, it would be difficult to describe more particularly the cause of the accident than by ascribing it to the negligent management of the train. In cases of collision of carriages and vessels the declaration is usually framed in general terms, as it is here, which leaves it open to the plaintiff to give in evidence any kind of mismanagement which led to the collision. (a)

The second exception taken by the defendants is, that the count does not shew that the plaintiff had any claim to be carried by them as a passenger, by reason of any reward paid or to be paid to them, or for any other reason, or that he was even in the cars with their consent.

It appears to us that there is no good ground for this exception. The statement is to the effect that the plaintiff, being a workman under a contractor employed by the defendants to keep the railway in repair, was a passenger in one of the trains belonging to the defendants and managed by their servants, which was at the time employed in conveying the workmen of such contractor to and from their work, and that he, the plaintiff, was then going in such train from the place where he was working to the place where he boarded. We think we must reasonably understand that the defendants' railway train was used with their consent in this service,

(a) See *Chy. Junr. Prec.* 522; *Williams v. Holland*, 10 Bing. 112; *Croft v. Alison*, 4 B. & Al. 590; *Addison on Torts*, 260; *Skinner v. London, Brighton, &c., R.W. Co.*, 5 Ex. 787; *Chy. on Plg. ii.*, 530.

when it is alleged that it was then under the care and management of their servants, and that the plaintiff, being one of the workmen of the contractor, was lawfully in the train.

Then, if so, does not a consideration for carrying the plaintiff sufficiently appear? We think it does. It is not indispensable that the plaintiff should have been an ordinary passenger, paying his fare out of his own pocket, and taking a ticket. We may presume, we think, that if, as is stated, the defendants did employ their trains and servants in transporting the workmen of the contractor to and from the work, they did so because they had made an arrangement to that effect with the contractor, and that such arrangement was for good consideration on their part; that is, was part of their contract. It is not indispensable in any such case that the consideration should move from the individual passenger.(a.) While the defendants allowed their carriages to be employed in transporting the men back and forward to the work, it was their general duty to see that the workmen were carried with reasonable and proper care, to avoid danger to their lives and injury to their duties, and any one of them suffering injury from the want of such care has a legal ground of action on his own account against the defendants.

We do not think that this case comes fairly within the principle of the decision in the case cited by Mr. Anderson, of *Degg v. The Midland Railway Co.*, for the plaintiff was not a fellow servant of those who were managing the defendants' train; and certainly, according to the statement in the count, he was lawfully on the train.

There is nothing, we think, in the last objection taken to the count, that the defendants' servants are not stated to have been acting at the time in the ordinary scope of their employment. It is averred in the usual terms that the defendants were managing their railway train by their servants, and managed it so negligently that the plaintiff was injured.

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(a) See *Skinner v. London, Brighton, &c., R. W. Co.* 5 Ex. 787; *Collett v. London and North Western R. W. Co.* 15 Jur. 1053, S.C. 20 L. J. Q. B. 411, 16 Q. B. 984; *Great Western Railway Co. v. Harrison*, 10 Ex. 376.



We think the plaintiff is entitled to judgment on the demurrer.

Our judgment upon the demurrer will determine whether the verdict for the plaintiff should not be set aside and a nonsuit entered. It is in that shape the rule was drawn up.

Being of the opinion that the plaintiff is entitled to judgment on the demurrer to the second count, it follows, according to the understanding on which the cause went off at the assizes, that the plaintiff shall retain his verdict for \$75 on the first count; but we must say that the plaintiff does not appear on the evidence to have acted reasonably in bringing this action, and we think the jury gave larger damages than he seems to have had a claim to on account of the injury he received.

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BAILEY V. JAMES McNEILY ET AL. (NINE DEFENDANTS.)

*Trespass to land—Evidence of possession by plaintiff.*

The plaintiff's husband living close to the lot of land in question, had for many years cut fire-wood and made sugar on it, and it had been assessed to him since 1843, but others had made similar use of it, though not to the same extent; it had never been enclosed, and the neighbours' cattle as well as his were accustomed to run over it. The plaintiff, a few days before this action, put up a fence on it, and some of the defendants thereupon put up another inside of it, and afterwards they all put up a fence along the limit between this and the next lot, thus shutting out the plaintiff, and fencing in the part which she had enclosed.

*Held*, that the plaintiff (shewing no other title) had not such exclusive possession as would entitle her to maintain trespass.

TRESPASS for entering upon the plaintiff's land, lot 17, in the 12th concession of Brockville, and cutting down trees, removing the fences of the plaintiff that were upon the said land, and placing rails, timber, and other materials upon the said land, building shanties thereon, and incumbering and injuring the land; making roads through it, and subverting the earth and soil; expelling the plaintiff from the said land, and taking and carrying away the cut timber and fence rails of the plaintiff, and converting and disposing thereof to their own use.

Defendants pleaded—1. Not guilty. 2. That the said lands and goods were not, nor were any or either of them the plaintiff's, as alleged.

At the trial, at Perth, before *Robinson*, C. J., it was proved that this lot had been located many years ago to a man by the name of Mooney, who had been long dead. He never lived upon the lot, but had chopped two or three acres upon it, which lay in a neglected state. No one had ever resided on the lot, or cultivated or enclosed any part of it, till last spring, a few days before this action was brought.

George Bailey, this plaintiff's husband, who died two years ago, owned and lived with his family upon a lot not immediately joining the land in question, but within the breadth of 100 acres of it, and he had been for many years in the habit of cutting fire-wood upon this vacant lot, and making sugar there, and his cattle strayed upon it; but he had enclosed no part of it, and though from being near the lot he had made more use of it than others had, yet it was proved that he had by no means had exclusive possession or use of it, for other neighbours had made sugar there, and McNeily had for several years got fire-wood from it, and the lot was open to the cattle of all the neighbours, which ran upon it, as well as Bailey's; and as the lot fronted upon the river Mississippi, it was no doubt a great convenience to the neighbours that it remained as it did, a common over which their cattle that were running at large could go to the water.

After Bailey's death his widow, the plaintiff, continued to live upon the lot which had belonged to her husband, and to act with regard to this vacant lot (called the Mooney lot) in the same manner as her husband had done, till a few days before the end of last March, when she sent one of her hired men to put up a fence on a part of this lot near the concession line, and while he was doing this, Michael Niel, one of the defendants, came and prevented him. He pulled down the rails which the plaintiff's servant had begun to put up, and told him that he would not allow him to put a fence there. The man reported this to the plaintiff, who desired him to go on with the fence, which he did, and put up 12 or 14 panels. This was on a Tuesday. Niel and two others of the defendants, Pretty and Sloan, came to this lot on the following morning, and began also to put up a fence inside that which the plaintiff had been putting up, and the next

day, or soon after, the plaintiff told her servant to put up a fence inside of theirs, which would shut out the defendants from the rest of the lot. This was done, and the next morning the fence was found to have been pulled away and the rails scattered on the ground, and a few days after, about the 1st of April last, all these nine defendants came together to the lot, and cut rails upon it, and made a fence along the line between lots 17 and 18 down to the river, fencing in the land which the plaintiff had enclosed, and shutting out the plaintiff from the land which her cattle, as well as the cattle of others, had been for many years in the habit of running on at their pleasure.

Bailey it appeared had been assessed for this land since 1843.

The lot was spoken of as a common by one of the plaintiff's witnesses, and it seemed to have lain open to the public, any body making use of it that thought proper to do so, Bailey more than others, because it lay nearer to him; and there was some evidence of his having desired others not to meddle with it, but till the occasion spoken of no means were taken to shut the public out.

One of the plaintiff's witnesses, George Bailey, the father of the plaintiff's husband, gave this account of the matter. He said that for 28 years George Bailey made sugar on the east half of this lot, and took fire-wood from it: that he, the witness, did not know that any one else claimed it: that the plaintiff had done the same since her husband's death: that one Sparrow also made sugar upon it: that it was always open: that the witness and his son also cut fire-wood on it: that Bailey made no clearing on it, except as he cut fire-wood: that he never tilled it: that a great many cattle owned by others ran upon it: that Michael Niel, one of the defendants, took fire-wood from it for several years.

This evidence having been given, the learned Chief Justice told the jury that he thought the plaintiff had not a right to sue for a trespass, for neither she nor any one had held exclusive possession of the land, or any part of it, till she first began to enclose it, and shut out others from what had before been common, and to which she shewed no better right



than the others who had gone upon it, and committed acts of trespass upon it, as well as she had: that the defendants it seemed were not content to be shut out by the plaintiff, and disputed her right to take to herself what had always before been common; and that these nine defendants were only to be looked upon as accountable for the act which they were found to have been jointly concerned in—that is, the putting up a fence through the lot to the river, some days after the plaintiff had made the first effort to enclose any part of the land. That fence, he remarked, was composed of rails which it was sworn the defendants had cut upon the land in question, and he thought that neither the cutting these rails nor the putting up the fence, could be held to be a trespass for which this plaintiff had any right to claim damages, as she neither shewed title to the land nor any actual exclusive possession or right of possession more than the defendants had, for she could not be held to have had peaceable and exclusive possession by the fences put up and pulled down in the contest between her and the defendants.

He requested the jury, however, to name a sum which they would give to the plaintiff as damages, if it should appear on further consideration by the court that the action could be sustained.

The jury assessed the damages at \$25, and the learned Chief Justice directed a verdict to be entered for the defendants, reserving leave to the plaintiff to move to have a verdict entered for her for the damages found, if the court should think her action capable of being sustained.

*Crombie* obtained a rule *nisi* accordingly, to have a verdict entered in her favour, or for a new trial on the law and evidence, and for misdirection, contending that the evidence shewed a right in the plaintiff to maintain trespass for the acts complained of.

*Prince* shewed cause, and cited *Heath v. Milward*, 2 Bing. N. C. 98; *Wheeler v. Montefiore*, 2 Q. B. 133; *Monahan v. Foley et al.*, 4 U. C. R. 129; *McLaren v. Rice*, 5 U. C. R. 151.

*Deacon* supported the rule, and cited *Revett v. Brown*, 5 Bing. 7; *Matson v. Cook*, 4 Bing. N. C. 392.

ROBINSON, C. J., delivered the judgment of the court.

The defendants, nine in number, were all proved by the plaintiff to have been jointly concerned in the act of putting up the fence on the 1st of April, and it was not proved that any act but that was committed by the nine defendants. The plaintiff therefore is confined to that act of trespass, namely, the cutting rails on this lot on that day, and to the putting up the fence on that part of the lot.

The plaintiff cannot upon the evidence be said to have had exclusive possession of the land when the defendants entered upon it and did the act complained of. She had no title to it more than the defendants had. The lot had up to the end of March lain open to every one. If the plaintiff or her husband made more use of it than others—that is, trespassed to a greater extent—it was only because living nearer it was more convenient for them to take those liberties with the land, which lay in common, and it was more an object for them to do so. When the plaintiff shewed a disposition for the first time in March last to take the lot to herself exclusively, and shut out all her neighbours and their cattle from going across it to the river, it is not surprising that they were not content to allow it, but shewed a disposition to contest her right. What followed afterwards was a strife in putting up and pulling down fences, and it has ended in the lot being at last left open as it had always been before.

The cases cited by Mr. Deacon of *Revett v. Brown*, (5 Bing. 7,) and of *Matson v. Cook*, (4 Bing. N. C. 392,) cannot in reason be held to apply in favour of the plaintiff, for what the court there regarded as possession sufficient to entitle a party to bring trespass against strangers, was a possession taken under colour of right, and had been for a time acquiesced in and enjoyed. Here the struggle was to prevent the plaintiff from taking exclusive possession; there had been no exclusive peaceable possession by her.

In our opinion the rule *nisi* to enter a verdict for the plaintiff should be discharged.

Rule discharged.

## READ V. WEDGE.

*Prohibition—Division court.*

*Held*, that under the facts stated below no ground was shewn for a prohibition to the division court: that the suit was clearly within their jurisdiction; and that the defence of coverture should have been set up in the court below.

This was a suit brought in the fifth division court of the county of Middlesex.

*D. G. Miller* moved for a prohibition to the judge of the county court of Middlesex, to restrain him from enforcing an execution upon a judgment obtained in this case in the division court. Defendant stated herself to be a married woman; and she moved for the writ on two grounds:

1st. Because she was sued as if sole, though she was married before the commencement of the suit, and from thence had been and still was a married woman.

2ndly. Because this suit, as she contended, was not within the jurisdiction of the division court.

*Knowles v. Holden et al.* (24 L. J. Ex. 223) was cited in support of the application.

It appeared by the affidavits filed in support of the application, that though defendant had a husband she lived and had for many years lived separate from him.

The plaintiff sued her on an account for money paid for her, and on some other items of account, and for wages for twelve months, at eight dollars a month; the principal demand being for wages.

The defendant appeared and claimed a set-off, and put the matter into the hands of a friend to manage as her agent. The plaintiff's demand exceeded \$200, but he abandoned the excess above \$99.75, and went only for that, as his account delivered shewed.

The defendant advanced a set-off exceeding \$400, one large item of which was for two years' board of the plaintiff.

When the case came on for trial it was referred to arbitration, by the plaintiff on one side and by defendant's agent or friend, one Brown, on the other, and, as appeared from the affidavits, with defendant's knowledge and assent at the time. It was referred to five men, who had been summoned



as a jury, and they heard the case, and awarded in favour of the plaintiff for \$98.

Judgment was entered for that sum, and execution had issued.

ROBINSON, C. J., delivered the judgment of the court.

We have at present only the statements made on the part of the defendant. The position of the plaintiff, while living with the defendant, seems to have been equivocal. After the lapse of two years the plaintiff sues her for wages, as if he had been her hired servant; while the defendant, in her set-off brought against him, claims payment for his board, as if he had been all that time a lodger with her.

Both the demand and the set-off were for causes of action over which the court had jurisdiction, mere matters of account.

It does not appear under what circumstances the defendant was living apart from her husband, whether in consequence of voluntary separation, or from her husband having abandoned her, or from her having deserted him, or being forced by his violence or other misconduct to leave him.

The affidavits shew no grounds, we think, for a writ of prohibition. The case was referred to arbitration by consent of parties, and it is clear that the defendant submitted her claim by way of a set-off to the arbitrators, who determined between them. The claims were all of a nature that shewed them to be within the jurisdiction of the court, and the objections which defendant states in her affidavit are such as it was open to her to take under sec. 112 of the Division Court Act, on motion to be made within fourteen days to the judge of the division court to set aside the award.

We do not think that this case by any means stands on the same grounds as that to which we were referred of *Knowles v. Holden et al.* (24 L. J. Ex. 223) in which the plaintiff affected title to land.

The plaintiff's claim here was for a demand which for all that appeared was clearly within the jurisdiction of the court, and it would not be made less so by the defendant setting up a cross demand on an account which in the whole far

exceeded the jurisdiction, but which consisted of various unconnected items.

The defendant, in her set-off delivered, charged the plaintiff as being debtor to herself, saying nothing of her having a husband, and for all we see she set up no such defence as coverture, either before the court or before arbitrators; and during the whole time it would seem that she had been living as a *feme sole*, though now, since the award has been moved against which was made on a reference to which her agent assented, she tells us that she was married more than thirty years ago, and that she has not lived with her husband for many years past, but the marriage she says has never been *regularly* dissolved. If she meant to set up coverture as a defence she should have done it at the proper time.

Rule refused.

### ECKHARDT V. RABY.

#### *Lease—Construction.*

The plaintiff on the 1st of April, 1858, leased certain land to defendant for five years at £100 a year, payable half-yearly, on the 1st of April and October *in advance*, and the lease contained the following provision: "It is mutually agreed on between the said parties, that is, if S. E. (the lessor) requires the premises before the term expires, he is to pay £50 to W. R. (the lessee) for possession; otherwise should W. R. require to leave before the term, he has to pay S. E. £50."

On the 6th of September, 1860, the plaintiff notified defendant that he would require the premises on the 10th of October following, and on that day he tendered the £50, which defendant refused.

*Held*, that he was entitled to maintain ejectment.

It was not proved at the trial whether the rent due on the 1st of October for the next six months in advance had been paid or not. *Quære*, whether if it had been shewn that the plaintiff received it, this would affect his right.

EJECTMENT by landlord against tenant for the west half of lot 17 in the sixth concession of Markham.

The case was tried before *Burns, J.*, at the last assizes held at Toronto, and the facts appeared as follow:

The plaintiff, by indenture of lease, dated the 1st of April, 1858, let to the defendant the land in question for the term of five years from the date, at the yearly rent of £100, payable half-yearly on the 1st of April and 1st of October, the rent to be paid in advance.

The lease contained this provision:—"And the party of the first part agrees with the said party of the second part, that he shall have and peaceably possess the said premises during the said term, without the lawful interruption or eviction of any person whatsoever." Also this provision: "the party of the second part is to have the privilege of summer fallowing and putting in thirty-one acres of wheat the last year, and to be allowed all necessary privileges to harvest the same when fit, to have the use of the barn a reasonable time for thrashing."

Then followed the agreement under which the action was brought:—"It is mutually agreed on between the said parties, first and second, that is, if Salem Eckhardt requires the premises before the term expires, he is to pay fifty pounds to William Raby for possession, otherwise, should William Raby require to leave before the term, he has to pay Salem Eckhardt fifty pounds."

The plaintiff caused notice in writing to be served on the defendant on the 6th of September last, that he should require the premises on the 10th of October, under the terms of the lease, and that he would, on that day, be ready to pay the defendant the £50 for the possession.

It was proved that the plaintiff attended on the premises on the 10th of October, and produced the money, £50, and offered it to the defendant, but the defendant refused to take the money or to give up possession of the farm.

A verdict was taken for the plaintiff, and leave reserved to the defendant to move to enter a nonsuit.

*McMichael* obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, or for a new trial. He cited *Doe Gardner v. Kennard*, 12 Q. B. 244; *Hilton v. Earl Granville*, 5 Q. B. 701, 730; *Doe Willson v. Phillips*, 2 Bing. 13.

*Eccles*, Q. C., shewed cause, and cited *Doe Henniker v. Watt*, 1 M. & R. 694; S.C., 8 B. & C. 308; *Doe Rodd v. Archer*, 14 East 245; *Doe dem. Wilson v. Abel*, 2 M. & S. 541; *Patt on Leases*, vol. ii., p. 460, 466.

ROBINSON, C. J., delivered the judgment of the court.

The case of *Doe dem. Gardner v. Kennard* (12 Q. B. 244



goes the length, we think, of supporting the plaintiff's case, upon the stipulation contained in the lease, though the previous case of Doe dem. Willson v. Phillips (2 Bing. 13) appears to have been decided upon a somewhat different view of the law. The defendant's counsel in this case does not seem to have rested his application for a nonsuit upon any such ground as the distinction between a covenant and condition, taken in Doe dem. Willson v. Phillips.

We think it quite clear that defendant was not entitled to six months' notice to quit.

It does not appear in the evidence whether the defendant had paid the rent (£50) which, according to the lease, would be payable on the 1st of October last, 1860. If that was paid, then in truth the lessor, instead of giving to the lessee any real compensation for the lessee's inconvenience of having the tenancy so abruptly put an end to, would have been merely giving back the rent which he had received in advance, and for which the tenant had had no consideration, and would have none if he was bound to give up the possession.

Whatever may have been the facts as regard the payment of this half year's rent, the question, where no fraud is imputed, is what is the effect of the provision in the lease in that respect. Could the lessor legally exact that rent after he had given notice in September that he would require the place *on the 10th of October*? If he could not, then the tenant need not have paid it. If he could legally exact it, then, however unreasonable it might seem, all that can be properly said upon it is, that the tenant should have taken better care of his interest than to agree to such terms. There is an appearance of inequality and hardship in this condition or stipulation as it applies to the tenant, and if the landlord having given notice to the tenant in September to leave on the 10th of October, received the half-year's rent in advance on the 1st of October, it would naturally give rise to a surmise that the lessor had meditated something unfair from the beginning.

But we must deal with the lease (so to call it) as it stands; and we cannot say that we are free from doubt upon it, but, as we have already stated, we incline to think that

we should look upon this stipulation as a condition rather than a covenant, although it must be admitted that the case Doe dem. Willson v. Phillips (2 Bing. 13) more nearly resembles this than the case of Doe dem. Gardner v. Kennard (12 Q. B. 244). In the latter case the defendant covenanted that on expiration of the notice given of the lessor's desire to resume any part of the land leased, he would peaceably surrender it up to him. That so far is more clearly a *covenant* than a condition, and so far would seem more favourable for the tenant in its effect than the provision in this lease on which the question turns. But then these words follow: "and that the said *M.* shall and may take *peaceable possession*," &c. Of this it may be said that the latter part, as well as the first, is still part of the *covenant* of the lessor, and may equally as well be taken as a covenant and not a condition.

There is this difference, however, between that lease and the present, that there are in it express words permitting the lessor to *resume possession*, which in the one before us there is not.

In Doe dem. Wilson v. Abel (2 M. & S. 541) in the lease there was a *covenant*, that if the lessor should desire to resume any part of the land demised for building, *it should be lawful for him to enter upon such lands*, &c.; and there was the usual condition, that if the tenant should make default in the performance of any of the covenants, the lease should be void, and it should be lawful for the lessor to re-enter.

Lord *Ellenborough* said at the conclusion of the judgment, "At the expiration of the notice her (the landlady's) steward attempts to make an entry by demanding possession; but instead of finding the premises open to him, he finds a person there resisting. He demands possession,—that is, that the lessor might enter for the purpose of building,—and the person refuses to surrender, which imports, not that he refused to execute a surrender, but to surrender according to the demand. Therefore it seems to me that, *quâcunque viâ datâ*, whether the lessor stands upon the covenant that she should be at liberty to determine the lease upon notice, or upon the covenant for re-entry for breach of covenants, she is entitled to the possession of this land."

In 8 Ves. Jr. 34, in a case of *Russell v. Coggins*, before Sir *William Grant*, Master of the Rolls, there was a motion for an injunction to restrain the defendant from proceeding at law to recover possession of premises demised by him. The proviso in the lease was, "that if the premises should be wanted for building, the *tenant* should deliver up possession." The answer stated that the defendant went to the plaintiff, and told him he *wished* to have the land for building, and that it was not colourable, for he had entered into a treaty.

Sir *William Grant* observed upon its not distinctly appearing that the defendant did want the land, though he said he had entered into a *treaty*; but "if he had said an agreement, there would have been an end of it." "*There is no defence*," he said. "*at law*. The question, therefore, whether the land was *bonâ fide* wanted can only be here, and it is not so clear that the defendant did want it, that he ought to be permitted to proceed at law, *where he must inevitably succeed*." His Honour, therefore, granted the injunction. If we could be quite sure that this lease said nothing about *re-entry*, or the lease being void, the case would perfectly resemble the present, and we should have very high authority for sustaining this plaintiff's action.

On the other hand, in *Doe dem. Willson v. Phillips*, (2 Bing. 13,) where the lease did very closely resemble the one before us, the provision being merely that in case the lessor should want any part of the land to build or otherwise, then the tenant *should give up* that part of the land to the lessor, who was to make an abatement in the rent, there, as we have before stated, the court held that this was not a condition entitling the lessor on breach of it to re-enter, but a covenant on which he must seek his remedy in damages. That case has been relied upon as a strong authority against the plaintiff, and so it is. But there is this difference, that in that case the lessee was to give up the land only in case the lessor "should want any part of it to build or otherwise, or cause to be built;" and there the court thought that injustice this should not be treated as a *condition*, but a *covenant*, for that, taken in that sense, if the lessor was obliged



to proceed upon it as a covenant it would be open to a court of equity, on an application for injunction against suing on the covenant, to compel him to shew that he had equitable grounds for desiring to resume possession, and that his wanting the land for building was not a mere pretence. Now in the case before us, the stipulation is that "*if the lessor requires the premises* before the term expires, he is to pay £50 to William Raby *for possession*, otherwise, should William Raby require to leave before the term, he is to pay Salem Eckhardt (the lessor) £50."

The clear meaning, we think, of that provision is that the lessor need assign no reason, but could at his pleasure put an end to the term, paying £50 as a compensation. And so far the stipulation is mutual, that the tenant was at liberty to depart whenever he pleased, paying also £50 as a compensation for leaving when he chose, which, according to the season of the year, might throw a considerable loss upon the landlord. This we think an important feature in the present case, and it seems to put an end to any question about six months' notice. We must suppose indeed that the £50 was meant to be a compensation for the sudden termination of the tenancy. The fact was, as it appears by the evidence, that there were no crops in the ground at the time of the lessor requiring possession. We mean no fall wheat had been sown.

On the whole, we have had much doubt about the case, and should like yet to know whether the rent due on the 1st of October last had been paid to the lessor, for if it had, then we doubt whether the lessor keeping that, and tendering only £50 to the tenant, should be held as having tendered what was necessary for entitling him to resume possession. We should have said rather that we could have made up our mind more satisfactorily upon the case, if it had appeared in evidence what was the fact in regard to the payment of the £50 for rent, which would no doubt have been payable if the plaintiff had not before that day come given notice that he would require the possession of the land, and that at a day so soon after the 1st of October as to deprive the tenant of all the advantage for which the rent would be paid if paid at all.

We wonder that the fact was not brought out in evidence, but it does not seem to have been, and if we were to grant a new trial on account of evidence which might and ought to have been given, we might be incurring the risk of throwing upon the plaintiff the loss of a year's rent from the farm, for before the result of another trial could be known to us, it would be too late for a new tenant to make a profitable use of the farm for the coming season.

We therefore discharge the rule.

Rule discharged.

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JAMES IRVINE V. DONALD NICHOLSON AND WILLIAM IRVINE.

*Guarantee—Variance—Admissibility of parol evidence—Statute of Frauds.*

The plaintiff sued on a guarantee, alleging, by way of inducement, that it was proposed to him by the defendant N., that if he would allow a certain assignment made to him of a leasehold property to be put on record, he, N., would give him security on other real property for the payment of certain moneys, to which the plaintiff agreed; and the plaintiff averred, that in consideration that he would allow the said assignment to be put on record, the defendants promised that the arrangement made with N. for the payment of the said balance, should be duly carried out, otherwise the defendants would pay the plaintiff £135, that being the sum to be secured. The breach was, that the defendants would not carry out the said arrangement, nor secure to the plaintiff the £135. The defendant N. pleaded non-assumpsit. The guarantee when produced shewed that the defendants had not agreed absolutely to secure the plaintiff, as alleged, but to pay the £135 if N. did not do so.

*Held*, that verbal evidence of an agreement to the effect declared upon, was inadmissible, and that it would at all events have been useless, for an agreement either by the defendant I., to become responsible for N.'s default, or by both to give security on real property, must be in writing.

This action was on an alleged agreement in the nature of a guarantee.

The declaration set out certain alleged facts and circumstances by way of inducement, which it was stated led to the plaintiff's exacting from the defendants the special undertaking on which he was suing. The plaintiff averred that it was proposed to him by the defendant Nicholson, that if the plaintiff would allow a certain assignment made by him to third parties of a leasehold property to be put upon record, which it had been intended should be withheld from registry until certain conditions had been complied with, and which

the said Nicholson desired should be recorded, in order to perfect a transaction in which he was interested, that he, Nicholson, would give to the plaintiff security on other real estate, or other "unexceptionable security," for the due payment of the balance of certain moneys at the time and in the manner thereafter mentioned, to which proposition the plaintiff averred he assented and agreed, on his being guaranteed that the arrangement would be carried out within a reasonable time; and that thereupon, in consideration that the plaintiff, at the request of the defendants, would allow the said assignment of lease to be put on record, so as to complete the title, &c., they, the defendants, jointly and severally undertook, guaranteed, and promised the plaintiff that the arrangement for the payment of said balance in manner thereafter mentioned would be duly carried out, as agreed upon between the plaintiff and the defendant Nicholson, as aforesaid, and the documents (securing the same) necessary for that purpose duly executed within a reasonable time, otherwise the defendants promised, and thereby held themselves personally liable to the plaintiff to pay the full amount of the sum of £135 and interest, as well as all costs the plaintiff might incur in enforcing the claim against the defendants; the said arrangement referred to, and so to be secured as aforesaid, being that the defendant Nicholson should pay to the plaintiff the sum of £20 annually, in such payments as should be agreed on, and also pay over to the plaintiff all the rents on the buildings erected on the said leasehold property, under deduction of ground rent and interest of said mortgage, to the defendant Nicholson, until the said £135, and interest at the rate of ten per cent. per annum, should be fully paid and satisfied.

Then, having thus set out what the defendants undertook to do, the plaintiff averred that he did what was desired of him as to allowing the said assignment made by him of the leasehold property to be put on record, but that nevertheless the defendants, although they had been requested, and although a reasonable time had elapsed, did not nor would either of them carry out or cause to be carried out the said arrangement so agreed on as aforesaid, "nor secure to the



plaintiff the payment of the said balance of £135, and interest thereof, either on real estate or otherwise howsoever, nor cause the documents necessary for that purpose, or any document whatever, to be executed, but therein wholly failed and made default, and the plaintiff lost and was deprived of and still is without any security for the payment of the said sum of £135 and interest, or any part thereof, and the same is wholly unpaid to the plaintiff.

The defendant Nicholson pleaded non-assumpsit. The other defendant, William Irvine, suffered judgment to go by default.

At the trial, at Toronto, before *Richards, J.*, the plaintiff produced and proved the following agreement, in the form of a letter from the defendants to John Irvine, dated Hamilton, 4th January, 1860, and addressed to the said John Irvine.

“Dear Sir,—In consideration of you as attorney for James Irvine allowing a certain assignment of lease by him, the said James Irvine, to R. M. and yourself, as trustees under the marriage settlement of William Irvine, one of the undersigned, and wife, to be put on record, so as to complete the title of the said trustees in the leasehold property there conveyed, although there is still a balance of £135 or thereabouts due to the said James Irvine on the purchase money of said leasehold property, we jointly and severally undertake to guarantee to you, as attorney aforesaid, that the arrangement hereinafter set forth, as agreed on between you and us, will be duly carried out, and the documents necessary for that purpose duly executed within a reasonable time, otherwise we hold ourselves personally liable to you, as attorney for said James Irvine, to pay the full amount of said £135, and interest, as well as the costs you may incur in enforcing the claim against us.

“The arrangement referred to above is that in consideration of you recording the assignment above mentioned, thus allowing a certain mortgage for £450 made by the said trustees to Donald Nicholson, one of the undersigned, to take precedence of the said claim by James Irvine of £135 or thereabouts, the unpaid vendor's lien being understood to remain good except as against the said mortgage for £450,

the said Donald Nicholson has agreed to pay to you, as attorney as aforesaid, the sum of £20 annually in such payments as may be arranged on, and also to pay over to you all the rents of the buildings erected on the said leasehold property, under deduction of ground rent and interest of the said mortgage to said Nicholson for £450, until the said claim of £135, or thereabouts, and interest at the rate of ten per cent. per annum, is fully paid and satisfied."

It was objected at the trial that this instrument did not support the plaintiff's action, but varied essentially from it. The plaintiff's counsel desired then to prove that there was a verbal agreement to the effect of that set out in the declaration, but such evidence the learned judge held to be inadmissible, and directed the plaintiff to be nonsuited, reserving leave to him to move against it.

*R. A. Harrison* obtained a rule *nisi* to set aside the nonsuit. He cited *Stephen* on Plg. 243-4; *Larned v. McRae*, 1 U. C. R. 106.

*Freeman*, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

When the written agreement is carefully compared with the declaration, it is evident that the objection of variance was properly held to be fatal. The plaintiff is not suing for non-performance of the only thing which by their letter the defendants bound themselves to do; that is, to pay the £135, if Nicholson (one of them) should not within a reasonable time execute such documents as should be necessary for carrying out an agreement, which is not clearly explained. This action is not brought to recover the £135, or any instalment of it; and indeed it was admitted on the trial that when this action was brought there was none of that money due, nor does it appear what precise arrangement has been come to in regard to the payment of that account.

But the breach of the guarantee on which the plaintiff sues is that the defendants have not given to the plaintiff (*James Irvine*) security upon real estate according to the guarantee. Now so far as the defendant *William Irvine* was concerned, he

could only bind himself in writing to be answerable for the default of another—that is, of Nicholson—and no action could be sustained against either of the defendants for not giving security upon real property without shewing that they agreed in writing to do so. The statute of frauds in both respects required written evidence of the contract. The plaintiff indeed did give written evidence of what the defendants did in fact agree to, but the writing does not support the statement in the declaration of what they engaged for.

The agreement was that if the necessary documents were not within a reasonable time executed for carrying out the agreement, then these defendants should pay the £135. They are not sued for the money because the other thing was not done, but are sued as if they had both agreed absolutely that deeds should be executed. The writing shews plainly that they did not so agree. We cannot look out of the writing to see what was agreed upon. Whatever conversation may have taken place before or at the time of signing that letter was made immaterial by the giving of that letter, for that is the only proof of the agreement at and up to that time.

It would no doubt have been allowed to the plaintiff to prove a sufficient agreement made *afterwards*, substantially varying from that, but it is not pretended that there was any such subsequent independent agreement, and if there was it would from the nature of the undertaking require to be proved by writing.

The plaintiff's counsel on the argument endeavoured to make out that he could rely upon what was set out in the inducement in the declaration for proof of such an agreement as he alleged, for that the defendants' plea of non-assumpsit admitted all the preparatory matter set out, and only denied that they ever made such a promise as the plaintiff alleged they had made. A careful examination of the matter set out by way of inducement shews that it is not in fact upon any thing set out in that the plaintiff can rely conclusively for shewing such a promise as he has sued upon, and besides, whatever statement of a promise the plaintiff could succeed in extracting from the count in any way, we must admit that the plea of non-assumpsit denies all that is



set out as a promise, and so far would put the plaintiff to proof of his inducement.

We have no doubt that the nonsuit was proper, and that the rule must be discharged.

Rule discharged.

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### STEWART V. WEBSTER.

*Award—Construction—Finality—Pleading—Allowance of interest.*

Under a submission of all matters in difference between the plaintiff and defendant, (not specifying any subject of dispute,) with power to the arbitrators to determine what they should see fit to be done by either, the arbitrators by their award—after reciting that one G., by a writing endorsed on the submission, had agreed to submit to them a charge of £250 per annum, made by defendant for the management of certain property in Berlin, in which G. and the plaintiff were jointly interested—found that on the 1st of September, 1860, defendant was indebted to the plaintiff in £3249 17s 8d., which they ordered him to pay accordingly, with interest half-yearly until paid. 2nd. As to the Berlin property, that as regarded the rights and liabilities of the plaintiff and defendant thereto, they did not find that any difference had arisen calling for their arbitrament (further than as might regard the said amount claimed for management) and they therefore made no adjudication on such right or liabilities. 3rd. As to certain property in Guelph, comprised in a deed made by defendant to plaintiff, they adjudged that the plaintiff should hold the same in fee by virtue of such deed, but that if he, or his heirs or assigns, should sell the same, or any part thereof, and should realize from such sale a larger sum than £1105, he or they should account for such surplus to the defendant, his executors, &c.

To an action on this award, defendant, after setting it out at length, pleaded: 1. That the arbitrators awarded upon matters not submitted, and which accrued after the submission, and upon accounts between the parties to a period long after the submission. 2. That the award was not final, in this, that the said matters relating to the Berlin property were matters in difference, and were submitted to the arbitrators, but that they did not award thereon; and in this, that they did not dispose of the difference respecting the value of the Guelph property, but left the same unsettled and dependent upon the sale thereof by the plaintiff, when only the amount to be accounted for to defendant could be determined.

*Held*, on demurrer, both pleas good; and as to the second plea, that the averment as to the Berlin property was a sufficient defence, and the plea therefore sufficient, although the award as to the Guelph land was not wanting in finality.

At the trial, upon issue taken on the first plea, it appeared that the plaintiff in April gave in a statement of his claim, calculated with interest up to that time, at 12 per cent., which had been the usual rate allowed in the dealings between the parties. At the defendant's request time was allowed him to prove his defence; and in making their award on the 6th of October, the arbitrators added interest at the same rate up to the 1st of September, on the sum claimed in April for principal and interest up to that time. *Held*, that they had power to do this, and to award interest on the amount until paid.

*Held*, also, that upon the evidence, set out below, the first plea was not proved.

*Quære*, as to the intention and effect of the direction in the award to pay the £3249, and interest half-yearly until payment.

This was an action upon an award made upon a submis-

sion entered into on the 23rd of February, 1860, to recover the sum of £3249 17s. 8d., and one half of £54 costs, paid by the plaintiff.

It was a submission of all disputes and matters in difference whatsoever between the parties, and it was one of the terms of the reference, as it was stated in the declaration, that the costs of the deed of submission, and the costs of the reference and award, should be in the discretion of the arbitrators, who might direct to, and by whom, and in what manner the same, or any part thereof, should be paid. It was also agreed by the submission, as the declaration stated it, that the arbitrators "should be at liberty to order and determine what they should think fit to be done by either of the parties respecting the matters referred."

The defendant, in two pleas, which were demurred to, did not traverse the submission, or deny that it was in the terms set out, but he first stated the award at length, and then took certain objections to it; first, because he said the arbitrators exceeded the submission, and secondly, because their award was not final.

The award, by the terms of the submission, was to be made on or before the 1st of May, 1860, or on or before any other day to which the arbitrators might enlarge the time, and it was averred that they did enlarge the time to the 1st of Jauuary, 1861, within which time—namely, on the 6th of October, 1860—the arbitrators made their award.

In this award, besides a short recital of the submission, the arbitra ors recited that George John Grange, of the town of Guelph, Esquire, did, on the 25th of August, 1860, by a writing endorsed on the said submission, undertake to submit to them a certain charge of £250 per annum, made by the said James Webster, the defendant in this case, and one of the parties to the submission, for the management of certain property situate in the town of Berlin, and county of Waterloo, in this Province, in which property, being a partnership property, the said Grange and this plaintiff, Stewart, were both interested.

And after these recitals the award proceeded as follows :  
" *First.* We find that the said James Webster, on the 1st

day of September, 1860, was, and still is, indebted to the said G. M. Stewart, in £3249 17s. 8d., and we order that the said James Webster do pay to the said G. M. Stewart the said sum accordingly. And we do further order, that until the same be paid the said James Webster do pay to the said G. M. Stewart interest thereon after the rate of six per cent per annum, to be computed from the said 1st day of September, and to be payable half-yearly, on the said principal sum or debt of £3249 17s. 8d., or so much thereof as may from time to time remain unpaid.

“*Second*, as regards that certain property known as the Berlin property, and which may be described as the unsold parts of the real estate at the said town of Berlin, and debts and assets arising from the sold parts thereof, as held in the name of the said George John Grange, in the terms of an indenture between the said George John Grange, the said James Webster, and Francis Shanly, Esquire, dated the 18th of February, 1854, we find that the said George M. Stewart being absolute proprietor of one third share of the same, or interest therein, acquired by him by purchase from the said Francis Shanly, is also the holder of another one third share of the same by virtue of an indenture between the said James Webster and the said George M. Stewart, dated the 10th of May, 1859; and that, as to the respective rights and liabilities of the said James Webster and George M. Stewart relative thereto, we do not find that any dispute or difference hath arisen concerning the same calling for our arbitrament, (further than as may regard the amount claimed as aforesaid for general management of the said Berlin property); and we do therefore make no adjudication on such right or liabilities as last aforesaid.

*Third*, as regards that certain property situate in the said town of Guelph, comprised in that certain deed of bargain and sale made by the said James Webster in favour of the said George M. Stewart, dated the 28th of October, 1858, and registered in the registry office of the county of Wellington on the 4th day of November following, we adjudge that the said George M. Stewart do hold the same in fee simple by virtue of the said conveyance thereof to him from the said



James Webster, but that if the said George M. Stewart, his heirs or assigns, shall sell the same, or any part thereof, and shall realize from such sale a larger sum than the sum of £1105, he or they shall account for such surplus when so realized unto the said James Webster, his executors, administrators or assigns.

And lastly, the arbitrators awarded that the costs of preparing the deed of submission were £1 10s., and the costs of the reference and of their award £52 10s., making £54, which they directed should be paid in equal proportions by each party, and that if either should pay to the arbitrators the share of the other, the party paying should be entitled to receive the amount so paid from the other on demand, with interest from the day of payment at six per cent., payable half yearly.

The defendant in the first plea averred that the arbitrators in making their award took into consideration and awarded upon matters not submitted to them, and which accrued after the submission was made, and awarded upon the accounts between the parties to a period long subsequent to the making of the submission, whereby the defendant averred, the award was void.

And in the second plea the defendant averred, as before stated, that the award was not final, in this, namely, that the said matters relating to the Berlin property were matters in difference between the plaintiff and defendant at the time of the submission, and were submitted to the arbitrators, and that they did not award thereon. And also in this, that the arbitrators did not dispose of the matters in difference between the plaintiff and defendant respecting the value of the Guelph property, in the award mentioned, but left that value unsettled and undetermined, and dependent upon the sale by the plaintiff of the said land, when and when only the amount to be finally accounted for to the defendant was to be settled, wherefore, the defendant averred, the award was void.

To these pleas the defendant demurred, on the grounds that the first plea imputed misconduct to the arbitrators, and as such was not an answer to an action on the award.

And as to the second plea, that the said plea setting out

the award and disputing its validity in law, tenders an issue of law to the jury and not to the court: that the arbitrators, as appears by the award set out, have found that there was no point in dispute about the Berlin property (except for management) and their decision cannot be reviewed, and that the award professing to be made *de præmissis* this item must be assumed to have been taken into consideration in awarding the sum to be paid to the plaintiff. That the said award is final as regards the Guelph property, inasmuch as it establishes the title of the property in the plaintiff, and fixes definitely the sum beyond which, if he sells the property, he is to account to the defendant for the balance.

*Read*, Q. C., and *Anderson*, for the demurrer, cited *Williams v. Wilson*, 9 Ex. 101; *In re Morphett*, 2 D. & L. 967; *Perry v. Mitchell*, 12 M. & W. 792; *Roberts v. Eberhardt*, 4 Jur. N. S. 899; *Wilkinson v. Page*, 1 Hare 276; *Cargey v. Aitcheson*, 2 B. & C. 170; *Aitcheson v. Cargey*, 2 Bing. 199; *McArthur v. Campbell*, 4 N. & M. 210; *Brad-dick v. Thompson*, 8 East 344; *Russell on Awards*, 524.

*Cameron*, Q. C., contra, cited *Mitchell v. Staveley*, 16 East 58; *Dresser v. Stansfield*, 14 M. & W. 822; *Charleton v. Spencer*, 3 Q. B. 693; *Roberts v. Eberhardt*, 3 C. B. N. S. 482; *Duckworth v. Harrison*, 4 M. & W. 432; *Gisborne v. Hart*, 5 M. & W. 53; *Samuel v. Cooper*, 2 A. & E. 752; *Price v. Popkin*, 10 A. & E. 139; *Russell on Awards*, 268-270.

ROBINSON, C. J., delivered the judgment of the court.

The first plea we think is a good plea. Whether it was afterwards upon the trial proved to be true is quite another question.

For all that we see upon the plea, the defendant means to affirm by it that the arbitrators took into their consideration and awarded upon transactions forming matters of account, which transactions were subsequent to the time of the submission, and that would certainly be an excess of jurisdiction. In truth the plea does amount to that in terms.

As to the second plea, the submission being of all matters

in difference, of course the arbitrators were bound to dispose of all matters that were in fact in difference between the parties in respect to the Berlin property, in which they held a joint interest.

The submission, as it is set out in the declaration, makes no allusion to any such matter as being in difference, but if there was in fact at the time of the award any dispute about that property, either of a pecuniary nature in consequence of sales made, or a dispute of any other kind, and the arbitrators had notice of such dispute or difference, and were requested to award upon it, no doubt it was incumbent upon them to dispose of it. This plea states that the said matters respecting the Berlin property were in difference. Now the said matters can refer to nothing in the submission as it is set forth in the declaration, for that makes no mention of it. Those words therefore can only refer to what is said of the Berlin property in the inducement to the plea: in other words, in the recital in the award and in the award itself. What is said of it in the recital in the award is, that Webster had made a claim of £250 a year for the management of that property, in which Stewart and Grange were jointly interested, and that Grange had submitted to be bound by the award, (as he might do, though not originally a party to the submission). This is no intimation of any matter in difference respecting the Berlin property, further than the question how much, if any thing, should be paid to Mr. Webster for the past management of it, which might give rise incidentally to a question how much of the allowance proper to be made to Webster each of these parties should pay; and if one had paid any sum on account of it, he would have a claim upon the other to be reimbursed in such proportion of it as the arbitrators should think right.

The award, as we have just said, gives no intimation of any other matter in difference between the parties respecting the Berlin property; and as the plea speaks of the said matters in difference, the defendant cannot be understood to be speaking of any new or other matter of dispute, unless indeed the award, in its reference afterwards to this property, had disclosed that there was some other matter in difference



in regard to it, but it does not. On the contrary, the arbitrators expressly assert that there was no other thing to be settled in regard to the Berlin property but that.

Then, taking that plea, as we think we must, to refer to the only matter in difference which had been alluded to in the previous part of the pleadings, the plea must be understood to state that the arbitrators did not award thereon: that is, that they did not settle the difference that there was between Webster and Stewart growing out of Webster's charge for managing the property. Taking the plea to refer to that, we have to consider that the arbitrators in their award do make mention of it as something that was in difference, but they do not say in any recital in the award that they had settled the dispute by their award, and the award does not give us to understand whether they did or did not.

The defendant, therefore, it seems to us, was at liberty to assert, as he does in this plea, that the said matters mentioned in the award as in difference relating to the Berlin property were in difference, and were submitted to the arbitrators, and that they did not settle that dispute. If that be true, then the award is not final. If it be not true, then the defendant must have failed on the trial if an issue in fact had been joined upon this plea, but it appears that the truth of the plea was not traversed.

As it stands the plea is, we think, a good defence; and the opinion we have formed on the pleadings is that judgment should be given for the defendant on both the demurrers.

We have not failed to consider, as regards the second plea, that the defendant relies upon two instances of want of finality in the award as rendering it void. We have spoken only of one—that which relates to the Berlin property. It does not seem to us that there is good ground for objecting that the arbitrators have not settled the difference between the parties respecting the property in Guelph, and settled it in a manner in which it was competent to them to dispose of it. We should always uphold an award against objections that are not reasonable, and should entertain every reasonable intentment in order to support it. For all that appears, the deal-

ings between the plaintiff and the defendant in regard to the Guelph property may have been such that it was quite compatible with justice, and with the understanding and agreement between the parties, as explained to the arbitrators, that Stewart should be determined to be the legal owner of the property, and at liberty to keep it or to dispose of it as he pleased, but that if he should sell it, and should obtain more than £1105 for it, that he should be held liable to the defendant for whatever sum he might receive beyond £1105. We can easily conceive such a state of things as would make that a just determination, and we do not think that the mere circumstance that the claim of the defendant to receive any thing beyond the £1105 is made contingent upon certain facts occurring or not occurring, and without certain limitation of time within which they must occur in order to give a claim, makes that part of the award illegal, either for uncertainty or for any other reason.

Then if this part of the award is not objectionable on the ground of want of certainty or finality, as we think it is not, this instance of want of finality set up in the plea would not of itself be sufficient to invalidate the award, and so far the plea would be bad.

Is it therefore insufficient, although it specifies another instance in which the award is not final, which, if it stood alone, would, we think, be sufficient to show the award void, unless it could be disproved?

That turns on the proper application of the principle that a plea bad in part is to be held bad in the whole, the meaning of which we take to be, that if a plea fails in any part of that which is essential to make it a perfect defence it fails altogether. We have had some doubt on that point, but we think we must hold that when a plea sets up a defence, such as in this case want of finality, which if it is well founded necessarily goes to the whole cause of action, the fact of the defendant specifying two instances in which the award is not final clearly does not make it necessary to prove both.

The case of *Spilsbury v. Micklethwaite* (1 Taunt. 146) is an authority on that point, and there is no doubt that it is a principle constantly acted upon, that it is only necessary to

prove so much of a plea as is necessary to show a good bar to the action. In a case like this the action is as clearly barred by shewing want of finality in one instance as in two, and as only one need be proved, or attempted to be proved, we take it for granted that it is not indispensable that the two instances of want of finality, which have no connexion with each other, should both appear to be good instances of such want of finality. (a)

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The plaintiff, besides demurring, took issue upon the first plea. No issue in fact was joined upon the second plea.

At the trial, at Guelph, before *Hagarty, J.*, the defendant gave this evidence in support of his first plea. He called Mr. Fergusson, one of the two arbitrators who made the award, and who gave the following testimony :

"I was one of the arbitrators under the submission produced, which is dated the 23rd of February, 1860. The award, made on the 6th of October, 1860, determines that the defendant was indebted in the sum named on the 1st of September, 1860. I did not understand that any transactions took place after the submission. We reckoned interest at a rate stated to have been agreed upon between the parties, from the 1st of April, 1860, to the 1st of September, 1860, on £3807 11s. 10d., interest £191 10s. 5d. on that sum.

"I and the other arbitrator had agreed on the first settlement. At the defendant's request we gave him another hearing. An amount was mentioned as the plaintiff's claim, which I understood was admitted throughout. I suppose the plaintiff charged the rate of interest agreed on. I think there was no award on the Berlin property except as to management; defendant claimed for management. We thought it (his claim) too much, and reduced it. We intended to bring every thing to the 1st of September. If any thing was allowed after the submission, it must have been on account of the defendant claiming it; I do not remember distinctly. We allowed defendant £1000 for seven years' management of the Berlin property. Can't say when they ended.

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(a) See *Dowland v. Thompson*, 2 W. Bl. 910.



The rate of interest was admitted. The plaintiff only made one claim against the defendant, at an early stage of the proceedings, the 9th of April, 1860. He made no claim that I remember for any thing else. (The claim is put in.) The defendant took this to copy."

The account put in shewed that interest at 12 per cent. was added to the principal in March, 1860, and interest at the same rate added to the whole sum of principal and interest up to the 1st of September, 1860, the day on which the award stated the sum of £3249 17s. 8d. to be due from the defendant.

The plaintiff, Mr. Fergusson said, put in his claim shewing the principal and interest due up to April. The arbitrators took that sum as his claim, as it were an account stated.

This being the whole evidence given, the learned judge stated his impression to be that the plea was not proved, for that it did not appear that matters not submitted had been awarded upon, which he took to mean some matters arising after the submission.

The charging interest upon interest, as had been done, might, he said, be a hard course, but could hardly be said to be new matter. He reserved leave to the defendant to move for a nonsuit, or for a verdict in his favour upon the first plea, and directed a verdict for the plaintiff to be entered for the amount awarded and interest, £3301 9s., together with the moiety of the costs of reference and award.

*Cameron*, Q. C., obtained a rule *nisi* to enter a verdict for the defendant. He cited *In re Morphett*, 2 D. & L. 967.

*Anderson* and *Palmer* shewed cause, and cited *In re Badger*, 2 B. & Al. 691; *Signall v. Gale*, 2 M. & G. 830.

The authorities cited upon the argument of the demurrer, ante, page 473, were also referred to.

ROBINSON, C. J., delivered the judgment of the court.

We do not think the learned judge was wrong in holding upon the trial that the evidence of Mr. Fergusson did not shew that the arbitrators had decided upon matters not referred to them.

Although the plea may be taken to import, as we think it does, that the arbitrators exceeded their authority by going into matters which arose or occurred after the submission, yet the plaintiff having denied that they did so, it became necessary for the defendant to prove it, and we cannot say that the evidence did establish it. The arbitrators in April, 1860, it appears, had heard all the plaintiff's evidence, and were ready to determine on the amount of his claim. It appears also that they did not find that the defendant disputed the plaintiff's charge against him, as it had been then made out to the satisfaction of the arbitrators; that is, we mean, they considered him to acquiesce in the debit side of the account brought in against him. But the defendant insisted that he had charges, or a charge of some kind, against the plaintiff, which he desired further time to enable him to make out. Mr. Fergusson stated that the delay in making up the award till October following was owing to this request of the defendant, to enable him to make out any claim of his: that no additional claim was advanced by the plaintiff for any thing that had been transacted after the submission, still less for any thing that had taken place between April and October.

What is complained of, it seems, is this, and nothing more, that the arbitrators carried forward interest upon the sum which they had found the plaintiff entitled to in April, 1860, to the 1st of September, 1860, at the same rate of 12 per cent. that they had allowed when they first struck the balance between the parties. If the defendant means to find fault with the rate of interest, which is certainly very high, that would be an objection to the award upon the merits, and on which we ought not to enter, for the parties were at liberty by law to agree to any rate of interest that they chose. It is sworn by Mr. Fergusson that he found that to be the rate understood and acquiesced in by the defendant, and for all we can tell there may have been a just reason, under the circumstances, for the plaintiff exacting a rate of interest that seems excessive, though we believe not altogether uncommon. It was for the arbitrators to determine between them upon that point; and they could allow also compound inter-

est, if they found it to be right according to the course of dealing.

What the defendant we think more certainly meant to object to, was the interest being carried forward to any period beyond the time of the reference in February, 1860. If the allowance of interest upon a debt due must cease from the time of submission to arbitration, plaintiffs would be little inclined to settle their demands in that manner, for they would lose an advantage which they certainly have when they proceed at law in a less amicable manner. We think it is the ordinary course, where interest is allowed, to carry it down to the time of making the award, either according to the rate agreed upon by the parties, or, where there is no special understanding, according to the rate fixed by law.

We do not find that it is held to be illegal to award interest upon the sum found to be due till it is paid; that is, we mean the common legal rate of interest, which was in this case awarded to be paid from the 1st of September, 1860.

On this matter of interest, we refer to the cases of *Morgan v. Mather*, (2 Ves. Jr. 15,) *Dick v. Milligan*, (Ib. 23,) *In re Morphett* (2 D. & L. 978,) *Doe dem. Moody v. Squire*, (2 Dowl. N. S. 327,) *In re Badger*, 2 B. & Al. 691; *Plummer v. Lee*, (2 M. & W. 499.)

If in carrying the calculation of interest further than the 1st of September, or even than the time of the submission, there was wrong done, of which we are not convinced, that would not be a reason for holding the award wholly void, but only a reason for striking out so much of the plaintiff's claim.

We are inclined to think from the terms of this award that the intention of the arbitrators was to leave the money in the defendant's hands so long as he paid the interest, but the legal effect is to make it payable on demand, at least so we suppose.

We think the defendant did not give such evidence in support of his plea as would entitle us to hold the award void for excess of authority, and therefore that this rule to enter a verdict for the defendant should be discharged.

The parties, it seems, are nearly connected, and have been



concerned together in business which implied an intimate relation between them; and the sum claimed by the plaintiff is large. We therefore think it right to allow the parties an opportunity of going to trial upon the truth of the defendant's second plea, as well as the truth of the first, and we grant a new trial upon payment by the defendant of the costs of the last trial, and allow the plaintiff to withdraw his demurrer and reply to defendant's second plea or join issue upon it, paying the costs occasioned by the demurrer.

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## LAUZEAU V. LEONARD.

*Railway—Detention of plaintiff by conductor, under 18 Vic., ch. 176, sec. 10—  
Limitation of action.*

In an action for assault and false imprisonment, it appeared that defendant, being conductor of a railway train, had detained the plaintiff under 18 Vic., ch. 176, sec. 10, to take him before a magistrate upon the charge of having obstructed defendant in the execution of his duty. *Held*, that he was entitled to the protection of the 26th clause, and that the action having been brought more than six months after the act complained of was too late.

ACTION for assault and false imprisonment.

*Plea*, justifying as an officer of the Great Western Railway, setting forth that defendant was a conductor of a railway train on the road between Hamilton and Toronto: that the plaintiff wilfully obstructed defendant in the execution of his duty, contrary to the statute; and that defendant thereupon detained him till he could take him before a justice of the peace to answer the charge, which are the trespasses complained of; and that this occurred more than six months before this suit was commenced.

The plaintiff admitted that this suit was not commenced within six months, but denied the residue of the plea.

The facts on which this action was founded took place in November, 1858. This was a second trial of the case. On the former trial, a verdict was also given for the plaintiff, for £50, which the court found was contrary to evidence, and a new trial was in consequence granted. (a) It was also urged then that the plaintiff could not recover, for that

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(a) Not reported.

under the 18 Vic., ch. 176, secs. 10 and 26, the action was brought too late.

At the second trial, at Hamilton, before *McLean*, J., after the plaintiff's evidence was closed, defendant moved for a nonsuit on the same ground.

The learned judge held that defendant was entitled to the protection of the statute 18 Vic., ch. 176, for that it was clear he was acting as an officer of the railway company, and in the execution of his duty as such, and whether he was strictly regular or reasonable in what he did or not, the defendant he thought was entitled to a verdict on the plea.

The plaintiff declined to take a nonsuit, and the case went to the jury, who found for the plaintiff £75.

*Irving* obtained a rule *nisi* for a new trial on the ground that the verdict was rendered against law and evidence, and the judge's charge: that the evidence and record shewed that the action was brought too late; and that this was a case in which the defendant was entitled to the protection of the statute: that the verdict was perverse, and the damages excessive.

*Start* shewed cause, and cited *Bross v. Huber*, 18 U. C. R. 282.

ROBINSON, C. J.—The evidence upon this trial was not such, perhaps, as shewed that the plaintiff was himself obstructing or impeding the defendant in the execution of his duty, though certainly some of those examined as witnesses for him on the trial might reasonably have been charged with doing so, for they improperly interfered in what should have been left to the defendant and the plaintiff to settle, and so aggravated the misunderstanding in a manner that might have led to serious consequences to other passengers.

But whether the plea which charged the plaintiff with obstructing and impeding the defendant in the execution of his duty was proved or not, which is open to consideration on this rule upon the evidence, the defendant is still in a situation to claim the benefit of his defence, that the action was brought more than six months after the alleged tres-

passes, which in truth is the defence his plea was intended to set up, the first part of it being merely introductory.

I think the damages were under the circumstances very unreasonable, though it may be that the defendant, thinking himself right at first in rejecting the ticket, may have exhibited more temper and impatience than was prudent or proper, provoked probably by the uncalled for and rude interference of other passengers.

But as to the strictly legal question, whether the action was not brought too late, and whether in consequence of that the jury should not have found for the defendant, according to the direction given to them by the learned judge at the trial—upon that point, that the action was brought after the six months is undeniable, and is admitted in the pleadings. It cannot be said that the defendant was not acting in the execution of the statute 18 Vic., ch. 176, when he preferred a complaint against the plaintiff under the 10th section of that act, which complaint was acted upon. As the officer in charge of the train, it was his duty to keep order, and to prevent, and so far as he could to punish, a violent opposition to his authority by laying his complaint before a justice of the peace. If he took an unreasonable course when he was opposed, that might place him in the wrong, and expose him to an action in which he might be made to pay damages. Still such action must be brought within the time limited by the statute, for if deferred beyond that the defendant loses the advantage which the statute was intended to give him, and which in such cases as this may often be important, for it may be impossible after a longer time to procure the witnesses who could prove what were the real facts of the case.

The jury were rightly told, I think, that the defendant was on that ground entitled to the verdict.

McLEAN, J.—This case was tried before me at the last Hamilton assizes, and the defendant's counsel objected that the action could not be maintained, being brought against a conductor of a railway train for an act done by him as such while in the discharge of his duty in the service of the Great



Western Railway Company, and no notice of action having been given to the defendant as required by the statute. The plaintiff's counsel contended that it was a matter to be submitted to the jury, whether the act for which the action was brought was in fact an act done by the defendant in the discharge of his duty, and he refused to accept a nonsuit. I told the jury that any person in a railway train who interrupted the conductor of such train in the discharge of his duty, was liable to be apprehended and punished as for a misdemeanour: that the plaintiff, while a passenger on the train of cars of which the defendant was conductor, was charged with having used violent and threatening language, and interrupting the defendant while in the discharge of his duty as conductor of such train; that it was a matter of much importance, and connected to a great extent with the safety of passengers on the railway trains, that the conductors of these trains should be allowed to attend to their duties without violence or threats from any passenger or other person: that the plaintiff being charged with such offence the defendant had authority to arrest him and bring him before a magistrate to answer for it; and that, though the magistrate might consider the charge not sustained, and might discharge the plaintiff, yet that the complaint being made and prosecuted by the defendant in his character as railway conductor, under the sanction of an act of parliament, he was entitled to a notice of action six months before such action was brought, and that without such notice no action could be sustained against him. I told the jury that the defendant must be considered as having acted in the matter complained of in the discharge of his duty, and that he was therefore entitled to notice of action. The jury, however, after a short absence returned into court, and rendered a verdict for the plaintiff and £75 damages, being £25, or half as much again as the verdict on the former trial between the same parties in this suit. A former new trial was granted on account of the utter disregard of the jury of the charge of the learned judge who tried the cause, and I must confess that the same spirit appeared to me to be abundantly manifest on the late trial.

I consider the verdict rendered as perverse, and am therefore of opinion that a new trial must be granted without costs.

BURNS, J., concurred.

Rule absolute, without costs.

### REGINA V. MILLER.

*Collectors of customs—Surety bond—Transfer of collector to different ports—Effect of on liability of surety—Pleading.*

*Sci. fa.* on a bond given by defendant as surety for one A., collector of customs. Defendant pleaded that A. was appointed a collector of customs in Upper Canada, and was so appointed as collector at the port of B., and to no other office; that under the statute he was required to enter into a bond with sureties for the due performance of said office, and thereupon the defendant executed a bond in reference thereto, as follows:—setting out the bond at length. It recited that A. had been appointed to the office or employment of collector in her Majesty's customs, and the condition was that so long as he should hold such office he should pay over all moneys received by virtue thereof. Defendant then alleged that the bond was executed in reference to said office of collector at B., and not in respect of any other office or employment, and that A., while he held said office, performed the duties, and paid over all moneys received by virtue thereof; that afterwards he resigned said office, and was without defendant's knowledge or consent appointed collector for the port of N., and subsequently for the port of R., at both of which places the moneys received were more, and the duties heavier, than at B.; and that if any breach of duty occurred on his part it was in respect of those offices, and not of his office at B. aforesaid.

The plaintiff replied that collectors of customs were and are appointed generally, and not to any particular place, so that they may be transferred as the service requires: that A. was so appointed generally, and the bond given in respect to such appointment; that as such collector he was, without any resignation, transferred respectively from B. to N., and from thence to R., at which last-mentioned port the breach of duty sued for occurred—without this, that he was at the time of giving said bond appointed collector at B., and not to any other office, and afterwards resigned said office.

*Held*, on demurrer to the replication, plea bad, for setting up as a defence that the bond was given in respect to the office of collector at B. only, when, as set out in the plea, it was clearly not so, but as collector generally; replication good.

At the trial, upon issue taken on the replication, A.'s commission was put in, dated the 28th of May, 1850, appointing him "a collector of her Majesty's customs in the Province of Canada," and a letter to the defendant from the customs department, of the 14th of May, informing him that he had been appointed collector of customs at the Port of Bruce, and requiring him to furnish sureties. The bond was dated 16th of May. The removal of A. to the ports mentioned in the plea was proved, and that he was in default at R., from whence he absconded.

*Held*, that defendant was liable for such default.

This was an action by *sci. fa.*, at the suit of the Crown, on a bond dated the 16th of May, 1850, given by the defendant as surety for one Henry Acton, collector of customs.

Defendant pleaded that on the 16th of January, 1851, Henry Acton was appointed to the office or employment of a collector of her Majesty's customs in the province of Upper Canada, and that at the time when the said Henry Acton was so appointed to the said office, he was so appointed as collector in her Majesty's customs at a particular port on lake Huron, known as the Bruce Mines, and not to any other office or employment whatever in her Majesty's customs; and thereupon, in pursuance of the statute in such case made and provided, and the regulations from time to time theretofore made by the Governor in council of the said province, and by the principal officer or officers or person or persons in the department to which the said Henry Acton was so appointed, the said Henry Acton was required to enter into a bond, with two sufficient sureties, to her Majesty, her heirs and successors, for the due performance of the duties of the said office, under the terms and on the conditions thereafter mentioned and set forth; and thereupon the said Henry Acton, and the said defendant and one William Bettridge, did enter into a bond to our Sovereign Lady the Queen in reference to the said office, and for the due discharge of the duties thereof, and which said bond and conditions are in the words and figures and to the effect following, that is to say:

The bond was set out at length; the principal, said Henry Acton, being bound in £500, and defendant and B., another surety, in £250 each. It recited the 4 & 5 Vic., ch. 91, sec. 1, by which persons appointed to any civil office are required to give security by bond in such form and with such sufficient surety or sureties as shall be approved by the Governor of this province, &c., for the due performance of the trust reposed in them, and for the duly accounting for of all public moneys entrusted to them, or placed under their control; and that the said Henry Acton had been appointed to the office or employment of a collector in her Majesty's customs, and had with his said sureties entered into the said above obligation, in compliance with the provisions of the said act. The condition was then declared to be (in substance) such, that if the said above bounden principal, so appointed to the said office or employment aforesaid, should, so long as he should



hold such office or employment, or be or remain charged with the actual discharge of the duties thereof, well, truly and faithfully account for, pay over, and deliver to the proper officer appointed in that behalf, all moneys, securities for money, and all other property that he should or might from time to time receive as the holder of such office or employment, or as the person charged with the actual discharge of the duties thereof, or that should or might come to or be placed in his hands, or within or under his power or control, by virtue of such office or employment, or of his being so charged with the actual discharge of the duties thereof, or which belonging to her Majesty, her heirs or successors, should or might in any other manner, or by any other means whatsoever, during the time aforesaid, come to or be placed in his hands, or within or under his control, &c.; and should, within the respective periods duly appointed for that purpose, render true and complete accounts of all his receipts and payments for or on account of, or in anywise relating to or affecting his said office or employment; and should observe the rules duly made for the conduct of his said office, and should at all times during the time aforesaid, in all other matters and things whatsoever, faithfully, honestly, and diligently and carefully do, perform, fulfil and discharge all and singular such other duties as by competent authority then were or thereafter should or might be attached to the said office or employment, and should on ceasing to fill the said office or employment deliver to his successor, or any other person properly appointed to receive the same, all books, &c., relating to his said office, then the obligation should be void.

And the defendant further said that the said bond was given and executed by the said Henry Acton, and the defendant and the said B., in reference to and in respect of the said office of collector of Her Majesty's customs at the Bruce Mines, and not in respect of any other office or employment whatsoever: that after the said appointment to said office the said Henry Acton entered upon the duties of the said office, and during all the time while he held the said office, or exercised the duties thereof, did well and truly observe, perform and keep all and singular the articles, clauses, payments,

conditions, and agreements in the said bond and the condition thereof specified, in all things on his part to be observed, performed, fulfilled, and kept, according to the tenor and effect of the said bond and condition. And that the said Henry Acton did after the making of said bond and condition, and before the commencement of this suit, from time to time, and at all times, so long as he held the said office or employment, or was or remained charged with the actual discharge of the duties thereof, well, truly, and faithfully account for and pay over, &c., to the principal officer of the department, &c., all moneys, securities for money, and other property that he, the said Henry Acton, did from time to time receive as the holder of such office or employment, or as the person charged with the actual discharge of the duties thereof, or that came to or were placed within his hands, or within or under his power or control, by virtue of such office or employment, or of his being so charged with the actual discharge of the duties thereof, or which belonging to Her Majesty in any other manner, or by any other means whatsoever, during the time aforesaid, came to or were placed in his hands, or within or under his power or control; and did, within the respective periods then or thereafter limited and appointed for that purpose by competent authority, render true and complete accounts, &c., of all his receipts and payments for or on account of or in any wise relating to or affecting his said office or employment; and also did during the times aforesaid, well and truly obey and keep all the laws, rules and regulations, and instructions by competent authority then or thereafter made, or which were in force for the conduct, management, or regulation of the said office or employment, or for the prescribing, assigning, or pointing out the duties thereof, and also did during the time aforesaid in all other matters and things whatsoever faithfully, honestly, diligently, and carefully do, perform, fulfil, and discharge all and singular such other duties as by competent authority then were or thereafter were attached to the said office or employment; and the said Henry Acton did moreover, on his ceasing to fill the said office or employment, deliver over to his successor the books, &c., relating to the business of said office.

And the defendant further said that after the said Henry Acton had held and exercised the said office and employment, from the time when he was so appointed as aforesaid until the 16th of May, 1853, he resigned and vacated the said office and employment, and thenceforth ceased to fill the said office and employment; and that afterwards, to wit, on the day and year last aforesaid, the said Henry Acton was, without the knowledge, privity, or consent of the said defendant, appointed by our Sovereign Lady the Queen, or by the Governor or person administering her government of this province, or by the head of the department to which the said office or employment belonged, to the office or employment of a collector in Her Majesty's customs for the port of Napanee, in the county of Lennox, and continued to hold and exercise the said office and employment without the knowledge, privity, or consent of the defendant, until, to wit, the 16th of May, 1855, when he ceased to fill the said last mentioned office and employment; and was afterwards, to wit, on the day and year last aforesaid, and without the knowledge, privity, or consent of the defendant as such security as aforesaid, or otherwise, appointed by, &c., to the office or employment of a collector in her Majesty's customs at Port Rowan, in the county of Norfolk, and that he continued to hold and exercise the said office and employment, without the knowledge, privity, or consent of the defendant, as surety as aforesaid or otherwise.

The defendant then alleged, that in the first mentioned office, of collector at Bruce Mines, the moneys which could or did come into the hands of the said Henry Acton were of small amount, and the duties of the said office were such as he could reasonably perform; but that in the other two offices such moneys were of much larger amount, and the duties more laborious, and such as he was not capable of performing; and that if any breach of duty on the part of the said Henry Acton did occur, or any loss or damage to our Sovereign Lady the Queen ever accrued in respect thereof, or by or through the said Henry Acton, it was in respect of the said office and employment as aforesaid at the said port of Napanee, or in respect of the said office and employment as afore-



said at Port Rowan aforesaid, or at both of the said last mentioned places, and not in respect of the said office or employment at the Bruce mines as aforesaid :

*Replication*, that collectors of customs and other officers in Her Majesty's customs, in and for the province of Canada, were, on the said 16th of January, 1850, and still are by commission appointed generally to Her Majesty's said customs, and not for any particular port or place in the said province, in order that the said officers may be transferred from port to port as required by the public service: that Henry Acton, in the said plea mentioned, was so appointed on the said day, and that his said bond in the said plea mentioned was given in respect of his said appointment to the office of a collector of customs generally, and not the collector of customs at Bruce Mines, in the said plea mentioned, or any other particular port or place: that he was, as such collector of customs, on the days and times in said plea mentioned, as required by the public service, by the proper authority in that behalf, and without any resignation by him of any such office, transferred respectively from the port of Bruce Mines to the port of Napanee, and from thence transferred to Port Rowan, at which last mentioned port the breach of duty in respect of which this proceeding by writ of *scire facias* is instituted arose and occurred; without this, that the said Henry Acton was, at the time of the giving of the said bond, appointed to the office of collector of customs at the port of Bruce Mines, and not to any other office or employment whatsoever in Her Majesty's customs, and afterwards resigned the said office of collector of customs at the port of Bruce Mines, asin the said plea alleged.

Defendant demurred to this replication, on the following grounds:—1. That the matters alleged if true are no answer in law to the defendant's plea. 2. That the matters set forth in the inducement do not amount in substance to a sufficient denial of the allegations in the defendant's plea. 3. Because the matters set forth in the inducement amount to a direct denial of matters intended to be traversed, and which are alleged in the said plea, and not to an indirect denial thereof. 4. Because the said commission and appoint-

ment of the said Henry Acton is not set forth in said replication, or the date, contents or particulars thereof, with reasonable or sufficient certainty. 5. Because the particular condition or conditions in respect of which it is alleged the said bond has become forfeited, or the nature or amount of the damages claimed in respect thereof, is not shewn in said replication; also, because the said replication is in other respects uncertain, informal and insufficient, and does not conclude to the country.

The plaintiff joined in demurrer, and gave notice of the following exceptions to the plea:—that it appears from the bond sued on and set out in the said plea, and the recitals and condition thereof, that the appointment of Henry Acton therein named was a general one, as collector of customs of Canada, and not restricted to any particular port. That the condition of the bond is also general in its language and operation, and that the plea attempts to introduce parol evidence to vary, add to, contradict or restrict the said bond; and that the defence attempted to be set up by said plea is based upon such parol variation and restriction. That the plea constitutes no defence to the action, as it does not shew that the defendant in any way put an end to his liability as surety for said Acton, by giving notice of his desire so to do, as provided in that behalf by statute; and that the bond being general in its provisions, extends to all defaults by the said Henry Acton as such collector of customs at any port or place in Canada, and renders defendant liable for all such defaults until he puts an end to his responsibility by giving such notice as the statute points out, or in such other way as the law allows, which is not shewn to have been done in this case.

*R. A. Harrison*, for the Crown, cited *Consol. Stats. C.*, chaps. 12, 16; *Shelley v. Wright*, *Willes* 9; *Lainson v. Tremere*, 1 *A. & E.* 792; *Bowman v. Taylor*, 2 *A. & E.* 278; *Stephen on Plg.* 165; *Guardians of the Poor of Portsea Union v. Whillier*, 2 *L. T. Rep. N. S.* 211.

*Eccles*, *Q. C.*, *contra*, cited *Mayor, &c., of Berwick-upon-Tweed v. Oswald*, 3 *E. & B.* 653; *Evans v. Bremridge*, 2 *Jur.*

N. S. 311; Mayor of Cambridge v. Dennis, 5 Jur. N. S. 265; Bank of Toronto v. Wilmot, 19 U. C. R. 73; Burge on Suretyship, 113, 115, 214, 216.

ROBINSON, C. J.—In our opinion we must hold the defendant's plea to be bad, in stating, as it does, that the bond sued on "*was given and executed by Acton* in reference to and in respect of the said office of collector of Her Majesty's customs at the Bruce Mines, and not in respect of any other office or employment whatsoever;" when by the bond and the recital, as set out in the plea, it was manifest that the bond was given in reference to the appointment of collector in Her Majesty's customs generally, and without any reference to the port of Bruce Mines in particular, or to any other port; and also in the commencement of the plea itself, the defendant stated that the appointment was to the office of a collector of Her Majesty's customs in the province of Upper Canada. If by the subsequent statement—that the bond given and executed expressly in reference to the office of a collector of Her Majesty's customs in Upper Canada, "*was given and executed in reference to and in respect of the office of collector of Her Majesty's customs at the Bruce Mines, and not in respect of any other employment or office whatsoever*—the defendant means only that the Bruce Mines was the port at which the government intended at first to employ him, and that in consequence of that intention and understanding, the undertaking of these sureties must be held to be limited to any thing done or omitted by Acton while he was stationed at Bruce Mines, though the appointment made him an officer of the department generally, then, by so pleading, the defendant is attempting to set up an alleged intention or understanding which may have been manifested, at if all, only verbally, or in some way by parol, against the express terms of the bond itself, as set out in the plea.

Evidence of surrounding circumstances may no doubt be received, in order to apply what could not otherwise have any certain application, or to enable us to give the proper interpretation to something improperly expressed, and sometimes to shew that that could not have been meant which



we might otherwise suppose to have been meant ; but where the sealed instrument or other writing is full, explicit, and plain, it cannot be narrowed in its application by alleging that something less was meant by the party who executed the instrument than is expressed in it.

For instance, if Acton had by his commission been made collector of customs at Port Bruce, as the defendant alleges in one place, though he says otherwise in another, the defendant, if he had been surety in regard to such office, could not be allowed to say that he only became surety in reference to and in respect of any moneys which Acton might receive for duties upon goods imported from England alone, or upon goods imported from the United States alone, or upon certain descriptions of merchandise only, when the appointment of the defendant as recited in the bond, and as admitted in the plea, was to receive duties generally, and when the bond was consistent with the appointment.

If the government could legally appoint Acton to be a collector of customs for Upper Canada, not restricting his duty to any particular port, and if they did so appoint him, and if the defendant, seeing that he was so appointed, became surety in a bond for the due discharge of his duties under that commission, he can as little set up that he was not answerable for any breach of a duty which came within the scope of the appointment, or, in the words used in the plea, that he gave and executed the bond in respect to something less than that which the bond plainly imports.

The defendant, by what he says of the appointment at the beginning of the plea, taken in connexion with the recitals in the bond executed by himself, and set out by himself in the record, can only, we think, be understood to mean in effect, that after Acton had been made a collector of customs generally the government employed him in the first place at Bruce Mines, and that that fact alone entitled the defendant to say that collector of customs *at Bruce Mines* was the office which he held and no other ; and that the defendant's liability as his surety ceased when he was sent to another port, though his appointment by commission made him a collector in the department generally, and though the defen-

dant, with knowledge of that fact, became liable for him in terms co-extensive with his duties under his commission.

If, however, we construe the plea too strictly, and if it should be thought that, notwithstanding all that appears on the face of the plea, we are at liberty to understand that the defendant means by it that Acton was already made *by his commission* collector of customs for the port of Bruce Mines, and for no other place, and that notwithstanding the terms of the bond which he executed he could be permitted to assert that such were the terms of his public appointment, then we might, we think, hold the plea to be good, for the defendant does aver that Acton performed all that according to the bond could be incumbent on him while he continued collector at Port Bruce; though possibly a critical comparison of the terms in which performance is averred with the very comprehensive language of the conditions themselves, as set forth in the plea, might shew that the defendant has not relieved himself from the obligation of the bond by clearly and completely setting forth a performance of the conditions.

But supposing for a moment that we could hold the plea sufficient in substance, is the replication, which is demurred to, a good answer to it? We think it is, for it denies the truth of the case set up by the defendant, that the appointment of Acton was confined to the port of Bruce Mines, and avers that the appointment was no other than is recited in the bond executed by the defendant, as set out by him in his plea. It traverses also the resignation of office alleged in the plea, and thus takes away all the foundation for the defence set up.

The defendant indeed appeared to rely chiefly upon this objection to the replication, that it did not set forth any breach of the condition. But was that necessary? The statute 8 & 9 William III., ch. 11, sec. 8, respecting assignment or suggestion of breaches does not apply to the Crown.<sup>(a)</sup> This has been always so held.

Then we have here a proceeding by *scire facias* to enforce a bond. The defendant, to relieve himself from the obliga-

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(a) See *Rex v. Peto*, 1 Y. & J. 171; Manning's Exchequer Practice, 141 note c.

tion, sets forth the bond, with a view to averring performance of its condition, and the question is whether he has well pleaded performance, for if so then the effect of his plea is to avoid the bond and make it no longer binding.

We think he has only pleaded performance of the condition in the sense in which he would have us understand it: that is, that Acton was only collector for the port of Bruce Mines, that the defendant only became surety for him as collector for that port, and that Acton complied with all the conditions of the bond while he was collector of Port Bruce, and has performed all that was incumbent on him as such collector. Now, independently of the question whether the plea in which performance is so pleaded is a good plea, the plaintiff in his replication wholly denies the truth of the defendant's allegation respecting Acton's appointment and duties being limited in the manner stated, and it is upon this that the plea of performance rests. If either the plea is bad, or if the answer to it be good in law, then the defendant is in the same situation as if he pleaded nothing to avoid the bond, and so the Crown will be entitled to judgment, as we think the case is.

Several cases were cited by the defendant's counsel upon the effect of a change in the office held, or in the tenure of the office, made by law or otherwise after the execution of the surety bond in this or any other such case. We have not remarked on them, because we have no doubt that if it had been well pleaded, and was not denied, that the defendant became surety for Acton only while he was collector for Bruce Mines, or for what he did or omitted while he was such collector, our judgment ought to be for the defendant.

It is material, in reference to the question brought up by this demurrer, to consider that the nature of the appointment of Acton to the office of collector of customs within the province generally, and without confining his office or duties to any particular port otherwise than as the government may in their discretion choose to employ him at one place or another during his tenure of office, appears to be quite consistent with the statute in force at the time of this appointment, 8 Vic., ch. 4, secs. 3, 5, 6, and 7; and that was a



public statute; the defendant must be supposed to have known it, and to have contracted with the knowledge that the collector could be appointed in the form in which he was, and would be subject to be employed where the government should think fit.

Judgment for the Crown on demurrer.

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Besides demurring to the replication the defendant took issue upon it, and the case came on for trial at Toronto, before *Richards, J.*

An exemplification of Acton's commission was put in, dated the 28th of May, 1850, by which it appeared that his appointment was "to be a collector of Her Majesty's customs in the province of Canada."

It was proved that prior to 1850 the commissions were in a different form, being restricted to a particular port, but that since the end of 1849 they had been general in form, being altered by the proper authorities, to enable the transfer of the officers from port to port without any new appointment.

On the 14th of May, 1850, the following letter was written from the office of the Commissioner of Customs to Acton, acquainting him with his appointment as collector of customs at Bruce Mines :

"INSPECTOR GENERAL'S OFFICE,  
"CUSTOMS DEPARTMENT.

"Toronto, 14th May, 1850.

"Sir,—I have the honour, by command, to acquaint you that the Governor-General has been pleased to confer on you the appointment of collector of customs, port of Bruce, with a salary of £75 per annum.

You will be required to furnish sureties, in the sum of £500 yourself, and two others in £250 each, and you will at your earliest convenience furnish me with the names of the parties you propose to offer, in order that the same may be submitted for His Excellency's approval.

"Upon the execution of the bonds, and the transmission of the usual fee of £3 5s., cy., to T. D. Harrington, Esq.,

chief clerk of fees, secretary's office, your commission will issue.

"I have the honor to be, Sir,

"Your most obedient servant,

"J. W. DUNSCOMB."

"Henry Acton, Esq.,

"Woodstock, C. W."

The bond was dated 16th of May, 1850.

On the 17th of June, 1850, Acton arrived at Bruce Mines, and remained there until the 4th of April, 1853, when he was transferred to Napanee, and on the 19th of September, 1856, he was appointed to Port Rowan, from whence he absconded some time in 1859, leaving a balance of \$725.20 unaccounted for.

Both of these appointments were spoken of, in the letters notifying Acton of them, as promotions, and the salaries attached to them were, at Napanee £125, and at Port Rowan £175, per annum.

A verdict was taken for the crown for £250, subject to the opinion of the court, and the question was whether after the promotions of Acton, without any new bond, the defendant could be held liable for the default at Port Rowan, to which upon the argument the counsel for the Crown confined the claim.

The demurrer and special case were argued together, and the authorities cited are given at page 491.

ROBINSON, C. J., delivered the judgment of the court.

First, did the defendant prove his plea? He did not, we think, for he did not show that the collector, Acton, was appointed collector for the particular port known as the Bruce Mines, "and not to any other office or employment whatever in her Majesty's customs."

On the contrary, it was proved by the production of his commission that he was appointed collector of customs *in the province of Canada*, without reference to any port or place in particular. And such mode of appointment was in conformity to the then existing law, 8 Vic., ch. 4, and placed him, under the provisions of that act, at the disposal of the

government as a revenue officer wherever they might think proper to send him.

Again, it is not true, as pleaded, that in pursuance of the statute, or the regulations of the government, Acton was required to give security in the terms expressed in the bond for the due performance of the duties "*of the said office*," if by the said office is meant collector of customs at Bruce Mines only.

The bond was executed on the 16th of May, 1850. The commission could not be legally issued under the statute till after security had been given. It was issued in fact on the 28th of May, 1850.

The only ground that the defendant has for stating that Acton was appointed collector at "Bruce Mines," as the plea states, is that on the 14th of May, 1850, a letter was written to him by some one from the customs department, informing him that the Governor-General had conferred upon him "the appointment of collector of customs (Port of Bruce) with a salary of £75 per annum," and calling upon him to find securities, himself in £500, and two sureties in £250 each, at his earliest convenience. And he was told that his commission would issue on the transmission of the bond after his sureties had been approved.

Any persons ignorant of what the law was, and omitting to enquire, might understand from this that Acton would necessarily be appointed collector for the place mentioned in this letter, and might in fact infer that if he should be appointed he would be employed at Port Bruce and no where else, but all persons were bound to know that the act 8 Vic., ch. 4, enabled the government, under whatever name he might be appointed, to employ him as they thought fit.

Then we cannot say in a court of law that the bond sued upon was given and executed, as the plea avers, in reference to and in respect of the office of collector at *Bruce Mines*, when in truth and in fact we see by the bond itself that it was given and executed in respect of the office of collector of customs in Canada, with nothing expressed in it about Bruce Mines.

Nor can it be said that the defendant proved that he had



performed all the conditions of the bond, which are general, when it was shewn that being, as the bond states, a *collector of customs*, he had not accounted for moneys received by him as collector at Port Rowan, which moneys he had under his appointment a legal right to collect; nor was it proved that he had paid over and accounted for all moneys belonging to Her Majesty received by Acton by virtue of his office, "or which in any other manner, or by any other means whatsoever, during the time aforesaid, came to or were placed within his hands, or under his power or control." This is what the defendant undertook he should do, but it was proved that while he was collector at Port Rowan he was considerably in default.

The plea moreover does not assert that Acton committed no breach of his duty as collector at Port Rowan, but that, if he did commit any breach of duty, it was either there or at Napanee, and not at the Bruce Mines.

The condition of the bond is broken if he failed to pay over and account for public moneys which came to his hands in any manner, or were by any means placed under his control.

It is hardly necessary to consider further whether the plaintiff did or did not prove his replication, but it appears to us that he did, to such an extent as to leave the plea unsupported by evidence so far as was necessary to make it a valid defence.

The defendant, we think, under the condition of his bond was liable for the default of Acton at Port Rowan, after he had been collector at Bruce mines.

Judgment for the Crown.

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## KESTEVEN ET AL. V. GOODERHAM ET AL.

*Compulsory reference—Time for moving—Statement of questions for the court.  
Building contract—Departure from its terms.*

On a compulsory reference a motion to refer back the award may be made within the first six days of the term following its publication.

Where the reference was "with power to the arbitrator, if either party requires it," to submit questions of law for the decision of the court.

*Held*, an enabling provision only, not compulsory.

An action upon a building contract having been thus referred, the plaintiffs contended that the defendants had broken the agreement so as to put an end to it, and that they (the plaintiffs) were therefore not bound by its terms, and they requested that if the arbitrators should not so determine they would certify the facts for the court. The defendants requested that if the award should be against them the arbitrators would certify to the court whether the contract bound the parties, and whether the engineer's certificate was final. The award was in favour of the plaintiffs, and one of the arbitrators, in compliance with the defendants' request, certified, without submitting any question, that the contract was binding and the engineer's certificate conclusive, and that the award had been based on that assumption. The plaintiffs afterwards moved to refer back the award with a direction that the contract did not bind, or to refer back the certificate for amendment, by stating the facts; but

*Held*, that as the arbitrators had not chosen to submit any point for decision, and were not bound to do so, the court could not interfere.

Remarks as to the circumstances under which a building contract is or is not rendered imperative by departure from its terms.

The plaintiffs brought an action against the defendants upon the common counts, for work and labour, and materials found, and on the money counts.

The defendants pleaded never indebted, payment, and set-off; and a special plea, that the work was done by the plaintiffs upon a certain contract to do the whole of the excavation and masonry required for erecting a steam mill and distillery proposed to be built for the defendants, according to certain specifications prepared by an architect, Mr. Roberts, which was to be completed by the 1st of September, 1859. The defendants then set out the terms of the contract as to the work, and as to the prices and terms of payment, and in regard to any addition to the work, or any deduction from it while in progress, providing how the same should be allowed for, and also providing what course should be taken in case the plaintiffs should not go on with the work to the satisfaction of the defendants or the engineer; and that the award of the engineer, in case of any dispute, should be final; and they averred that in several respects the plaintiffs failed to fulfil their contract, and had departed from it in certain particulars, which were specified:—namely, in not having

completed it by the time agreed upon, so that the defendants were compelled to have it finished by others; in not executing the work in the manner required by the contract, or directed by the defendants' engineer, and in obstructing the work of other contractors by their delay, so that the defendants were obliged to proceed with the work themselves, according to the terms of the contract; and generally, that the work was not done to the satisfaction of the defendants or their engineer, or according to the contract.'

The plaintiffs took issue upon all these pleas.

At the assizes, at Toronto, the learned judge who presided directed that the case should be referred, and it was accordingly referred to three arbitrators chosen by the parties, one of whom was Mr. Read, a barrister and Queen's counsel.

Among the terms of the reference endorsed on the record, and afterwards embodied in the rule of reference, was this, "with power to the said David B. Read, if either party requires it, to certify to the court of Queen's Bench any question of law which may arise, and the facts relating thereto, for the decision of the said court on such questions of law."

It appeared by the endorsement on the record, and it was stated in the argument of the rule *nisi*, that this minute had been drawn up in such a manner at first as to make it imperative on the arbitrators to certify if either party should require it, but that the plaintiffs' attorney objected to it being so worded, and it was altered from the words "shall certify" to the words "with power to the said D. B. Read, if either party requires it, to certify:" and so the minute stood when it was signed by the attorneys and by the judge, and so it was in the rule of reference drawn up upon it.

The arbitrators were occupied more than twenty days in investigating the matter, and several days after in making up the award.

A verdict had been taken for the plaintiffs for \$10,000, with power to the arbitrators to increase or diminish the damages, or to find a verdict for the defendants.

They made an award in the plaintiffs' favour, on all the issues, and directed a verdict to be entered for them for \$1970: that is, a majority of the arbitrators so awarded.



While the arbitration was going on, the plaintiffs' attorney (as he stated in his affidavit) had contended that the defendants had broken their contract by taking the work out of the plaintiffs' hands without justification before it was completed, and this he maintained entitled the plaintiffs to be paid for what they had done according to a *quantum meruit*, without regard to the prices in the contract; and he stated that he required, in the event of the arbitrators not so determining, that Mr. Read should certify to the Queen's Bench the facts and evidence on that point, and that the arbitrators should state how much the plaintiffs were entitled to supposing the contract not to have been rescinded, and how much upon a *quantum meruit*, if it had been rescinded.

The defendants, on their part, had requested Mr. Read, in case the award should be against them, to certify to the court of Queen's Bench:

1. Whether the written contract, specifications and plans in evidence, did not bind the parties.

2. Whether the course of conduct had not been such as to make the contract prices and terms govern as to all the work done.

3. Whether the certificate of the engineer, Roberts, was not final and conclusive between the parties.

Mr. Read, on the same day that he and one of the other arbitrators made the award, drew up and signed a certificate, in which he recited the request that had been made to him by the defendants' counsel to certify, in case the award should be against the defendants, as it was; and in which he certified, in answer to the first question, that the written contract, specifications, and plans in evidence did bind the parties, so far as the work set forth therein. To the second question, that the contract prices did govern as to the work done under the contract; and to the third question, that the certificate of Roberts was final and conclusive, as far as related to the work done under the contract; "and that the award of the arbitrators had been based on the above assumption and finding."

*Hector Cameron* for the plaintiffs, on the first Saturday of this term (the award having been made on the 31st of December) moved for and obtained a rule on the defendants to shew

cause why the award should not be referred back to the arbitrators, with a direction that the plaintiffs on the law and evidence were entitled to an award for the work done by them according to measurement and value, on a *quantum meruit*, without reference to the contract or the prices mentioned in it, on the ground that the defendants had broken the contract and put an end to it; and also that the engineer's certificate should not be considered final and conclusive as to the work and measurement. Or why the certificate of Mr. Read should not be referred back to him to amend it by stating to the court the facts and evidence as to the violation or rescision of the contract, and as to the questions referred to in his certificate, and for a report or certificate to the court as to the points and questions raised by the plaintiffs' counsel on the arbitration. He cited Russell on Awards, 315; Addison on Contracts, 446; Cutter v. Powell, 2 Sm. Lea. Cas. 1.

*Alexander McDonald* shewed cause, and cited Midland R. W. Co. and Heming, 4 D. & L. 795; Dodd v. Platt, 6 Jur. N. S. 631; Miller v. Shuttleworth, 7 C. B. 105; Wood v. Hotham, 5 M. & W. 674; Munro v. Butt, 4 Jur. N. S. 1231; Scott v. Corporation of Liverpool, 3 De G. & J. 334; Scott v. Avery, 5 H. L. Cas. 811.

ROBINSON, C. J., delivered the judgment of the court.

In shewing cause against this rule, a question was raised as to whether it was moved in time, but this being a compulsory reference, we consider that the motion may be made, as it was here, within the first six days in term, under the 165th section of the Common Law Procedure Act, although a verdict was taken. Indeed we did not understand this objection to be pressed on argument.

Then as to the merits of the application, it seems clear, upon the cases cited in Mr. Russell's treatise on Awards, p. 315, that when the arbitrator has merely *power given* to him to raise or state any question of law for the decision of a court, it is merely an enabling, not a compulsory provision, and that he is not bound to do it unless he thinks fit.

Wood v. Hotham (5 M. & W. 674) is a decision to that effect, and in Jay v. Byles (3 M. & S. 86) the words "*shall*

*state points of law,*" were treated as not compulsory. That indeed may seem at variance with the common import of the word "shall," but if we reflect a moment we must see that in reason some discrimination must be left to be exercised by the arbitrator even under the use of those words, for otherwise either party might occasion vexatious delay and expense by requesting that to be referred as a question of law about which no one knowing any thing of law could have a doubt, or which could not be properly a question of law, but must be one compounded of law and fact, which we take to have been the nature of the questions which are referred to in the rule before us.

If, for instance, either party in a case of this kind should request the arbitrator to refer it to the court as a question of law, whether the circumstance of the price of labour and materials having risen or fallen since the contract was entered into should not be taken to prevent the contract prices from being binding upon the parties, it would be absurd that such a question should be gravely referred to the court.

But when, as in this case, the arbitrator is empowered only, and not required by the terms of the reference, to refer any point of law, it is held not to be compulsory, and we must so determine. Such indeed is the reasonable import of the words used.

Then we must consider that we have not in fact had any point referred to this court on which our opinion is desired. The arbitrator, Mr. *Read*, has done nothing more than certify upon what principles the arbitrators proceeded in making their award, and this he did, as he states, at the request of the defendants, against whom he has made his award, and not at the request of the plaintiffs, who are now moving. The object in doing this seems to have been to afford an opportunity of shewing how the arbitrators had dealt with the question, in order that if either party were dissatisfied with the conclusions, they might move against the award. Certainly nothing has been referred to us for decision, nor is the award moved against: we mean there is no application to set it aside.

For what purpose, then, are we desired to exercise a jur-



isdiction? We are asked to send the award back to the arbitrators, with a direction that they must allow for the work done according to what they find to be its actual value, without regard to the contract or the prices named in it. That is asking of this court to go into the merits of the case, which we should have no power to do even if the award had been moved against. It is only in few cases, comparatively, that a building contract, even of the most moderate and ordinary character, is carried out without some deviation in point of time, material, quality of work, or design. Many alterations take place at the suggestion of the builder himself as he proceeds with the work; and it would be intolerable if, on account of such variations, either party could claim as a legal right that the contract should be wholly laid aside as it regarded prices, and that he was at liberty to go into the question of prices at large, just as if none had been fixed.

Sometimes the contract is broken by the builder being behind with his work, or the other party in finding materials which it depended on him to furnish, or by changes made in the plan affecting either the quantity or description of work, or by the party for whom the work is being done obstructing its progress. From whatever cause the contract may have been departed from in any case, there is no such abstract rule of law as that the contract *must* nevertheless be taken as a guide in regard to the prices to be paid for the work done, or that it *must not* be so taken. In each case much may depend upon the questions of fact, how the contract came to be departed from, and whether it has been departed from to such an extent that the contract ought to have no influence in regulating the prices. Then, again, it is to be considered what provision the contract itself has made on the subject, for most contracts do contain clauses expressly intended to guard against any deviation from it, by adding to the work or diminishing it, having any effect upon the scale of prices for the different kinds of work that had been agreed upon between the parties. And besides all this, it generally happens that the conduct of the parties afterwards, in going on with the work as if the old scale of prices were still to govern, and without giving

any intimation of a contrary intent, satisfies a jury, or arbitrators, that though the contract prices may not be in law any longer absolutely binding, there is no good reason for laying them aside, but great justice in adhering to them. The question is in general one of both law and fact, as we have already stated. In the present case, too, it was asserted and not denied on the argument, that after those things had happened which the plaintiffs contend made the contract no longer in strictness applicable, the plaintiffs continued to accept payment for works estimated according to the contract prices, and give receipts as for money paid to them "on account of the contract."

Then as to that part of the plaintiffs' application which asks us to send back the award to the arbitrators, with a direction from this court that the engineer's certificate should not be considered final and conclusive as to the work and measurement; the arbitrators have determined that question without referring it to us. All that Mr. Read's certificate states, if that be such a paper that we can properly look at, is that the award has, as a matter of fact, been based on that assumption and finding. No question is submitted to us on that or any other point, and we have no authority to pronounce that the engineer's certificate should or should not be conclusive under the circumstances proved.

Another alternative of the rule is, that this court should refer back to Mr. Read his certificate, and direct him to amend it by referring certain questions to us. That we cannot do, because it would be taking out of his hands a discretion which the terms of the reference gave him, according to the construction which courts of justice have placed upon the same words in other cases; and the plaintiffs cannot with much reason complain of any hardship in this respect, since the construction put by the courts upon the words, which merely gave to the arbitrators *a power* to refer, has only the effect of placing the submission on the very ground which the counsel himself states he endeavoured in vain to place it on, by suggesting a form of expression more clearly giving a discretion than the words that were used.

We think we cannot do otherwise than discharge the rule.

Rule discharged.

## VIDAL V. DONALD.

*Attorney—Action for costs—General issue—Defence of negligence admissible but not sustained by evidence.*

In an action by an attorney for his costs, negligence may be set up as a defence under the general issue.

In this case the attorney brought an action for the defendant against one M., which was entered for trial in October, 1855. The assizes began on Tuesday, and the attorney sent subpoenas to the defendant for his witnesses on Saturday. A friend of defendant called on the attorney on Monday, and told him that the subpoenas would not reach the defendant until Wednesday, and asked for other subpoenas, which he said he would serve himself and bring in the witnesses, but the attorney would not give them. The witnesses did not appear, and the cause was put off, this defendant paying costs. It was brought to trial in April following, and the plaintiff, the now defendant, got a verdict for \$387 10c. M. obtained a rule nisi for a new trial on affidavits, but the papers were mislaid, through no fault of the plaintiff's attorney, for nearly two years; and in Easter Term, 1858, the case was argued and a new trial granted on payment of costs. M. did not serve his rule until November, 1858, and the costs not having been paid, the attorney in March, 1859, entered judgment, and issued a *fi. fa.*, which was returned *nulla bona*, M. having sold his property and left the country in October previous. In an action by the attorney for his costs, the jury having found for defendant:

*Held*, that the evidence did not support the verdict, for the defendant had obtained a judgment against M., which might yet produce the debt, and it could not be said that the plaintiff's services had by his negligence become wholly worthless to defendant. A new trial was therefore granted.

*Semble*, that if defendant had lost all benefit from his action by its not having been tried in 1855, the court would not have interfered, for the attorney, in refusing to issue new subpoenas on the Monday, might be considered to have taken upon himself the risk of consequences.

The plaintiff sued for costs due to him as an attorney for conducting a suit in the Queen's Bench for this defendant, Donald, against one Milligan.

The defendant in this case pleaded, 1, *nunquam indebitatus*, and; 2, payment before action brought.

At the trial, at Sarnia, before *Draper*, C. J., it was proved that the plaintiff having been retained by the now defendant, Donald, to bring an action for him against one Milligan, to recover a debt, did commence an action in this court by process sued out on the 12th of September, 1855.

The cause was at issue, and ready for trial at Sarnia, in October following.

The witnesses for the plaintiff, (Donald,) however, though subpoenas were sent for them, did not appear, and the cause was in consequence not tried, and the defendant, Milligan, received £12 10s. for the costs of the day from the now defendant, Donald.



In April, 1856, the plaintiff's attorney, Vidal, took the cause to trial, and obtained a verdict for \$387 10c. The defendant, Milligan, moved in the succeeding term for a new trial, and obtained a rule *nisi*, upon affidavits as well as on other grounds. By some accident the affidavits and papers in the cause were mislaid, before cause could be shewn against the rule, but it was not pretended that they were lost by the plaintiff's attorney, Vidal, or by any fault of his. This occasioned a long delay, the plaintiff's attorney pressing from term to term to have his rule *nisi* made absolute, and the court enlarging it at the instance of Milligan, in the hope that the affidavits and papers might be found. They were not found till after Hilary Term, 1858, and in Easter Term, 1858, on hearing the parties, the rule *nisi* for a new trial was made absolute, on condition of Milligan, the defendant, paying the costs of the former trial. Milligan took out this rule, and served it on the 30th of November, 1858, on a clerk of Mr. Vidal's.

Milligan did not pay these costs, and in March, 1859, the present plaintiff, as attorney for Donald, entered judgment on the verdict, and took out a *fi. fa.*, which was returned *nulla bona*.

The defendant in that suit, Milligan, who it appeared continued to live in Upper Canada till October, 1858, and possessed property, sold off his effects about that time, and went to the United States, and had never returned.

This defendant seemed in consequence to have no prospect, or at least no immediate prospect, of being able to collect the debt for which he had judgment.

His counsel at the trial set up these facts as a defence, with a view to prove that the neglect of his attorney, the present plaintiff, in the suit against Milligan had rendered all his services in that suit entirely unproductive of any good to him, and that they being of no value from his fault he could not recover compensation for them.

The learned Chief Justice hesitated to admit the evidence upon the pleas which the defendant had put in, but on the authority of a decision produced to him at the trial he did admit it; and at the conclusion of the case he observed to the jury that if it were made perfectly clear by the evidence that

the action against Milligan had become wholly useless to the now defendant from the neglect of the present plaintiff, their verdict should be for the defendant. But he remarked that it was not shewn that the delay of judgment from the papers having been lost or mislaid arose from any fault of the plaintiffs's attorney, and that Donald, the now defendant, had at last obtained a judgment for his debt, which was a better security than a simple contract.

The taxed costs in Donald v. Milligan, on entering judgment, were \$209 85c. The plaintiff sued for these only, not for costs as between attorney and client.

With respect to any neglect of the present plaintiff to have his client's witnesses subpœnaed for the first trial, the evidence was to the effect that the assizes in the autumn of 1855, began at Sarnia on a Tuesday: that on the day before (Monday) a friend of Donald's went to his attorney to enquire what steps he had taken to procure the witnesses, when he was told that subpœnas had been sent for them to Donald on the Saturday before: that Mr. Vidal was told that Donald could not receive them in the country, where he was, till the Wednesday afternoon following, and the witness (Evans) asked Mr. Vidal to take out other subpœnas and give them to him, and he would take them and bring in the witnesses. This he said Mr. Vidal would not do. The assizes lasted two or three days. Donald came in himself to Sarnia on the Monday before the assizes, and remained until they were over.

The jury found a verdict for the defendant.

*Prince* obtained a rule *nisi* for a new trial on the law and evidence, contending that the defence of negligence was not admissible under the pleadings, and that if it had been, yet negligence was not proved such as could be held to have rendered the plaintiff's services of no value. He moved also on affidavits alleging surprise in having the evidence admitted upon the pleadings.

*Richards*, Q. C., shewed cause, and cited *Hill v. Allen*, 2 M. & W. 283; *Bracey v. Carter*, 12 A. & E. 373; *Lewis v. Samuel*, 8 Q. B. 685; *Ch. Arch. Prac.* I. 117; *Saund. Pl. & Ev.* 250.

As to surprise, it was sworn in an affidavit filed on the part of defendant, that the plaintiff's attorney was made aware some days before the trial that the defence of negligence was intended to be set up, but it was not sworn that he agreed to allow it to be given if not properly admissible on the record.

*Prince*, in support of the rule, cited *Templer v. McLachlan*, 2 New Rep. 136; *Chapman v. Van Toll*, 27 L. J. Q. B. 1.

ROBINSON, C. J., delivered the judgment of the court.

It does not seem reasonable or consistent with sound principles that the defendant should be allowed to set up negligence at the trial under a plea of never indebted. In *Templer v. McLachlan*, (2 New Rep. 136,) it was not permitted, even under the old rules of pleading, and in *Symes v. Nipper*, (12 A. & E. 377, note,) the Court of Queen's Bench seemed to consider it inadmissible. In *Bracey v. Carter*, (Ibid. 373,) they held it to be evidence under non assumpsit where the negligence of the attorney was such as to render his services wholly useless to the client. In *Hill v. Allen*, (2 M. & W. 283,) the Court of Exchequer took the same view of the law, and even held a special plea bad which set up negligence as a defence, on the ground that it amounted to the general issue. The question seems to be now set at rest. We think the evidence was admissible though not specially pleaded.

Then as to the alleged negligence. What the defendant complains of is, first, the plaintiff not having sent for the witnesses in time, which prevented the case being tried in October, 1855.

If the plaintiff had not been instructed beforehand where the witnesses lived, and that it was necessary to send subpoenas for them some days before the trial, it would hardly be reasonable to hold the attorney liable, when he sent subpoenas on Saturday to bring the witnesses to Sarnia on the Tuesday following, for the disappointment probably arose from this defendant, to whom they were sent, having left home before they reached him. The defendant, if he or his



witnesses lived in a place so much out of the way that it would take a letter from Saturday to Wednesday to reach them by the post, should have come in before to see about his witnesses, or should at least have made his attorney aware in time of the necessity of making this preparation at so early a day. But when the defendant's friend came in on Monday, and informed the attorney, as he swore he did, that the subpoenas he had sent by post would not reach in time, and offered to take subpoenas out himself to insure the witnesses being served in time, and when the attorney declined to do this, it might reasonably be considered by the jury that he took the risk of consequences upon himself; and we do not think we should have interfered with the verdict, if there was good ground for holding that the defendant lost all benefit from his action on account of the case not having been tried at those assizes in 1855.

But that was really not the case, for the attorney carried the cause to trial at the next assizes, proved his case, and got a verdict in the plaintiff's favour.

The defendant in that action, Milligan, moved upon affidavits for a new trial, and obtained a rule *nisi*. The court thought that the affidavits disclosed such ground that it was necessary they should be answered on the part of the plaintiff, Donald.

The unfortunate accident of the papers having been lost, or rather, as it seems, mislaid, occasioned a long delay, for the court required to see the affidavits, and what answer could be given to them. If this had not happened the rule would have been made absolute in Easter Term, 1856, instead of Easter Term, 1858; and at that time, and for two years afterwards and more, the defendant, Milligan, it appears was still in Canada, and had property, and could have been made to pay if judgment had been recovered when it might have been if there had been no accident from loss of papers.

When the affidavits were found, after the lapse of about two years, the court were not told where they came from, but it is fairly admitted in the case that they were not mislaid by the plaintiff's attorney, or by any fault of his. In Easter Term, 1858, it was that the court made absolute the rule for

a new trial, on the ground of surprise and the absence of a material witness. This was ordered on the condition of the then defendant, Milligan, paying costs, which it seems he did not do, nor even served his rule for a new trial till November, 1858.

From November, 1858, till March, 1859, there occurred a delay on the part of the attorney in taking steps to enable him to enter judgment, which we do not see accounted for in the evidence. If the costs had been paid after Easter Term, 1858, the new trial would hardly have taken place so that judgment could be obtained before the time that Milligan had parted with his property and left the country. Whether that delay could be said to have been the cause of the then plaintiff, Donald, not getting judgment before Milligan had gone, was for the consideration of the jury under the direction of the judge upon the trial of this case. It must always be a matter of doubt what Milligan would have done if the plaintiff's attorney had taken steps to compel him to take out his rule and pay costs. He would probably have hastened his departure, but whether he would or not no one can tell. He had gone before the rule for a new trial was taken out by him and served.

And after all there remains this consideration, that this plaintiff's services cannot be said to have been wholly useless to his client, Donald, since he did at last obtain judgment upon the verdict, and on the authority of *Templar v. McLachlan*, (2 New Rep. 136,) that cannot be held to be a service of no value, inasmuch as for all that appears the debt may be yet collected under it at some future period, either here or in the country to which Milligan has gone, and it is only when the services rendered were utterly worthless that alleged negligence in conducting the case can be held to bar the action of the attorney for his costs.

Upon the facts as they appeared in evidence, and also upon the affidavits filed by the plaintiff, we make absolute the rule for a new trial, costs to abide the event.

Rule absolute.

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## SIR CHARLES JAMES STUART, BARONET, v. PRENTISS ET AL.

*Deed—Construction—Filling up blanks—Consideration—Effect of becoming a nun.*

The Crown, in 1798, granted 5000 acres, including the land in question, to John and Elizabeth Hay and three others, children of the late Governor Hay. In 1800 Elizabeth became a nun in Montreal, by which, according to the law of Lower Canada, she became civilly dead as regarded her property, and she afterwards died there in 1838.

In 1804 John Hay conveyed "all his *fourth* part or share" of the lands mentioned in the above patent, "containing in all five thousand acres," to his brother-in-law M., the husband of one of the patentees. This deed was executed in Indiana, and was expressed to be in consideration of natural love and affection, and of one dollar paid. When executed, the words "fourth" and "five thousand" were omitted, but attached to the deed was a letter of the same date, signed by the grantor, and addressed to M., in which he mentioned these blanks and told M. to fill them up according to the fact; adding in a postscript, that if any errors should be found in the deed he authorised M. to rectify them, and that such corrections should be valid as if he had made them himself. The words "fourth" and "five thousand" were inserted after M. received the deed in Lower Canada.

On the 19th of January, 1805, M. and his wife Agatha, and John Hay, by deed reciting the patent, conveyed to R. and D. 2000 acres, parcel of the 5000 acres granted, "being the undivided part and portion of the said 5000 acres belonging, under and by virtue of the said letters patent, to John Hay and Agatha M." This deed was executed by M. and his wife, and by John Hay by his attorney M., but there was no evidence of any power of attorney to M.

On the same day, all the patentees except Elizabeth conveyed to R. and D. her share, assuming that it had vested in them by her becoming a nun. The plaintiff claimed under these conveyances—defendant under a deed from the heir at-law of John Hay.

*Held*, 1. That by the deed of 1804, John Hay's share passed to M., the consideration being sufficient, and the insertion of the words mentioned not being fatal under the circumstances. 2. That the conveyance of 1805 passed his share as belonging to M., though the execution by M., as his attorney, could have no effect for want of authority. 3. That Elizabeth clearly had not lost her share by our law, by becoming a nun. The plaintiff was therefore held entitled to a verdict for one fifth and the defendant for the other.

EJECTMENT for lot 8, in the first concession, and the west half of lot 9 in the second concession of Lansdowne.

The defendants appeared and defended for two undivided fifths of the said land, and the plaintiff took judgment for the rest.

At the trial at Brockville, before *Draper*, C. J., a verdict was taken for the plaintiff, subject to a special case stated, of which the following are the material facts:

On the 20th of November, 1798, the Crown granted the lands to Henry Hay, Richard Hay, John Hay, Elizabeth Hay, and Agatha de Montigny, only children of the Gov-



ernor John Hay, mentioned in the case of *Doe Hay v. Hunt*, 11 U. C. R. 367.

The only shares in question in this case were those of John and Elizabeth, being the two undivided fifths defended for.

On the 28th of July, 1800, Elizabeth became a nun, and took the veil in Montreal, in Lower Canada, and by the laws of Lower Canada she became in consequence civilly dead as regarded her real and personal property. She died at the Hotel Dieu in Montreal, on the 12th of November, 1838, in her 70th year, intestate, and without issue.

At the time the patent issued Agatha (Hay) was the wife of Pierre Jean Baptiste Louvigny de Montigny.

On the 8th of December, 1804, John Hay and Marguerite his wife conveyed to Pierre Jean Baptiste Louvigny de Montigny, his heirs and assigns, "all their fourth part or share of the several tracts of land lying, being, and situate in the townships of Walsingham, Charlotteville, and Lansdowne, in Upper Canada; which several tracts of land, containing in all *five thousand* acres, were granted by his Britannic Majesty to the heirs of the said John Hay deceased, for services rendered by him."

This deed was expressed to be made "for and in consideration of the natural love and affection which they, the said John Hay and Marguerite his wife, have and bear unto the said Pierre Jean Baptiste Louvigny de Montigny, as well as for and in consideration of the sum of one dollar currency of the United States, to them in hand paid, the receipt whereof they do hereby acknowledge."

It was admitted that in the deed when executed by John Hay and his wife, at Cakokia, in Indiana, the words "*fourth*" before "*part*," denoting the share of the land, and "*five thousand*," were not inserted, but blanks were left which were not filled up until the said deed was received by the said de Montigny in Lower Canada, but were after the receipt of said deed filled up, under what circumstances it was left to the court to infer from said deed and the letter accompanying it, so far as they might constitute evidence.

On the same sheet of paper as the deed, and bearing the

same date, was a letter signed by the grantor, and written in French, as follows; (the parts not material to the case being omitted):

DEAR MONTIGNY,—

Annexed I send you a gift of my share of the lands. If it will be of any service to you, after the debts are paid, I shall feel much pleasure. You will find some blanks, which you can fill up by inserting whatever my share may be, whether a sixth or an eighth, and the quantity of acres that the several parcels amount to, &c. \* \* Margaret embraces you, as do I also with all my heart, without forgetting poor Betsey, who being now retired from the world, ought not to be angry with me for making you this gift, &c.

Adieu, and believe me,

Your affectionate Brother,

JOHN HAY.

P. S.—If any error is found in this deed of gift, whether in the names of places or otherwise, I authorise you by these presents to rectify them, and every error rectified in the said deed of gift I certify by these presents to be valid in every manner, as if I had made the corrections myself.

(Signed) JOHN HAY.

Cakokia, 8th December, 1804.

On the 19th of January, 1805, John Hay and P. J. B. L. de Montigny, and Agatha, his wife, (formerly Hay,) granted and conveyed to Patrick Robertson, and David David, of Montreal, by deed reciting the patent of 20th November, 1798, for a consideration of £400, 2000 acres of land, part and parcel of the said 5000 acres granted, “being the undivided part and proportion of the said 5000 acres belonging under and by virtue of the said letters patent to the said John Hay and Agatha de Montigny,” to hold to the said Patrick Robertson and David David, their heirs and assigns for ever, as tenants in common. This deed was executed by John Hay, by his attorney, de Montigny, and by de Montigny and his wife on their own behalf.

It was admitted that there was no evidence of any power of attorney from said John Hay to the said de Montigny, except in so far as any power or authority might be contained in said deed from said John Hay and wife to said de Montigny hereinbefore mentioned, or in said letter endorsed thereon.

On the 19th of January, 1805, Henry Hay, Richard Hay,

John Hay, the said Pierre Jean Baptiste Louvigny de Montigny, and Agatha, his wife, by deed reciting the patent of 20th November, 1798, in consideration of £200, granted, bargained, sold, &c., "one thousand acres of land, part and parcel of the said 5000 acres of land hereinbefore described, granted as aforesaid, being the undivided part and proportion of the said 5000 acres heretofore belonging, under and by virtue of the said letters patent, to the said Elizabeth Hay, and now belonging to the said Henry Hay, Richard Hay, John Hay, and Agatha de Montigny, the said Elizabeth Hay having since the granting of the said letters patent become a professed nun of the Hotel Dieu in the city of Montreal," to hold to the said Patrick Robertson and David David, their heirs and assigns, as tenants in common.

This deed was executed by Henry Hay, Richard Hay, and John Hay, by their attorney, Louvigny de Montigny, and by Louvigny de Montigny and Agatha de Montigny in person.

Patrick Robertson died in 1808, in Montreal, intestate, and without issue, leaving three brothers, of whom Neil, the eldest, left only one daughter, who died unmarried in 1823. Alexander, the next brother, died in 1797, leaving his daughter Elizabeth, who, in 1818, married Sir James Stuart, Bart., Chief Justice of Lower Canada, and father of the plaintiff, who died in 1853.

The plaintiff's mother died in 1849, and as her heir-at-law he claimed the shares of the patentees John and Elizabeth Hay, under the two deeds last mentioned, and by virtue of several deeds of partition enacted between himself and the representatives of David David, conveying to him these lands in severalty.

John Hay died in 1841.

On the 5th of August, 1850, Richard Hay, his eldest son and heir-at-law, executed a deed to the defendant, in which the letters patent of the 20th November, 1798, were recited: that Henry Hay, one of the patentees, died at Montreal in 1810, unmarried and intestate, and without having disposed of his interest in the lands granted by the patent: that he left John Hay, his eldest brother and heir, surviving: that Elizabeth, another of the patentees, died unmarried and in-



testate, at Montreal, in 1838, leaving her brother, the said John Hay, surviving: that the said John Hay afterwards removed to the state of Illinois, where he died in 1842, intestate, leaving the said Richard Hay, the grantor, his heir: that the said John Hay, if the said patent created a joint tenancy, may have been the legal owner in fee of the whole of the said lands, and died seised thereof, but did at any rate die seised of three undivided fifths thereof.

And then, for a consideration expressed of £1000, he bargained and sold to the defendant Prentiss in fee the several parcels of land mentioned in the patent,—that is, the whole 5000 acres,—the before mentioned undivided three-fifths absolutely, and all the estate, interest, right, and title of the said John Hay to the other two-fifths.

*J. S. Macdonald*, Q. C., and *Connor*, Q. C., for the plaintiff, cited *Keane v. Smallbone*, 17 C. B. 179; *Doe dem. Tatum v. Catomore*, 16 Q. B. 745; *Doe dem. Newman v. Rusham*, 17 Q. B. 723, 734; *Bishop v. Chambre*, 3 C. & P. 55; *Doe dem. Phillpott v. Blanchfield*, 1 U. C. R. 350; *Doe Spafford v. Breakenridge*, 1 C. P. 503; *Doe Watson v. Routledge*, Cowp. 702; *Stewart v. Aston*, 8 Ir. C. L. Rep. 35. *Texira v. Evans*, 1 Ans. 229; *Doe Lewis v. Bingham*, 4 B. & Al. 672; *Tay. Ev.* 484, 930; *Master v. Miller*, 4 T. R. 320, S. C. 1 Ans. 225; *Com. Dig.*, “*Abatement*,” H. 41; *Shep. Touch.* 201; *Doe Clark v. McInnis*, 6 U. C. R. 28.

*Campbell*, Q. C., for defendants, cited *Burrel’s case*, 6 Rep. 72; *Warburton v. Loveland*, 6 Bligh. N. R. 30.

ROBINSON, C. J., delivered the judgment of the court.

By our statute, 43 Geo. III., ch. 4, the patentees must be taken to have been tenants in common, unless it appeared on the face of the patent that the intention was that they should take as joint tenants.

The plaintiff’s title to three fifths of the land in question is not in dispute. The defendant has appeared only for two fifths, and the plaintiff has judgment for the rest. It is not stated in any notice of title such as is usually attached to the record, but we were told on the argument that the contest is

only about the shares which John Hay and Elizabeth Hay, his sister, took as grantees named in the patent; and the defendant when he attempts to make title to those two shares, shews that his claim extends to none of the others, for he has only appeared and defended for two fifths.

Then, first, as to the share of the patentee John Hay, we have, in the first place, his deed of the 8th of December, 1804, by which he conveyed to his brother-in-law, Pierre J. B. Louvigny de Montigny, all his *fourth* part or share of the 5000 acres granted by the patent. This was evidently intended as a gift to de Montigny.

Then, next, we have the deed of the 19th of January, 1805, by which John Hay, or rather de Montigny in his name, as his attorney, professes to grant to Patrick Robertson and David David, both of Montreal, his fifth share of the land granted by the patent.

De Montigny and his wife, Agatha, (formerly Hay,) are grantors in the same deed, and the three grantors convey by it 2000 acres, or, as they explain it in the deed, two undivided fifths of the 5000 acres; so if John continued at that time to be seised of his interest as patentee, notwithstanding his deed to de Montigny of the 8th of December, 1804, this deed would have vested his estate in Robertson and David, the grantees, provided de Montigny had authority from him to execute such a deed in his name. On the other hand, if he had divested himself of his interest by the deed which he had made on the 8th of December, 1804, to de Montigny, then this deed of the 19th of January, 1805, must have carried the interest which had belonged to John Hay to Robertson and David under the words of grant from de Montigny.

The deed is signed "John Hay, by his attorney, Louvigny de Montigny," but what authority he had to execute as John Hay's attorney is not shewn.

It seems clear he had none, and that this was only an effort to confirm and free from doubt the title which de Montigny had taken under the deed of the 8th of December, 1804, and which he was about to transfer to Robertson and David. John Hay was not himself doing any thing by this

deed inconsistent with the disposition which he had made of the lot in 1805.

It is clear that for all that appears nothing could have passed to Robertson and David as by conveyance from John Hay under this deed of the 19th of January, 1805, for want of proof of authority to de Montigny to make the deed in his name.

But did not the deed executed by John Hay himself, on the 8th of December, 1804, to de Montigny, pass his interest? It no doubt had that effect, unless the alterations that were made in it, as stated in the case, vitiated it. Its being made without any valuable consideration moving to it, beyond the 5s. named, would not signify, for we have no creditor disputing it, and we take it to be now the settled doctrine of the courts that the mere fact of a deed being voluntary does not necessarily make it void against a subsequent *bonâ fide* purchaser for value, though it may raise *primâ facie* an inference of fraud; and more especially in a case like the present, when the second conveyance was not made by the same person who made the first, but by his heir, who can hardly be looked upon in reason as having inherited his fraudulent intent, and so made the second deed for carrying out a fraud upon the second purchaser, which was intended when the first deed was made. The case of Doe dem., Newman v. Rusham, (17 Q. B. 722,) is a strong authority on that point. The sufficiency of the deed, leaving out of view the objections on account of filling up blanks after execution, cannot we think be denied. It contains mention of a pecuniary consideration, which though trifling is sufficient when it is not opposed on any other grounds than its being merely voluntary. Our statute, 4 W. IV., ch. 1, sec. 47, and the decisions in this court upon it, leave no room for a question as to the necessity of registry to supply the place of enrolment; and besides, a consideration of natural love and affection is expressed, which we think we should be warranted in holding would avail in this case, where the conveyance is not to a stranger, but to the husband of the grantor's sister, though he was not a relation.

Then as to the other grounds on which this deed was



attacked, we think they are not such as the defendant is entitled to succeed upon. In the first place, the leaving blanks at the time of execution, where the word *fourth* now stands in the deed, and the words "five thousand," do not necessarily, under the circumstances, render this deed invalid, on the ground merely of its being imperfect for the want of words denoting the share and the number of acres.

If the words "five thousand" had never been inserted, it would not have signified, because the reference made in the deed to the patent was in itself sufficient to shew what lands had been granted to the children of Governor Hay. The patent so referred to could always be read in connexion with the deed, and would be taken as if incorporated in it.

Then as to the share, it is evident the grantor, John Hay, was uncertain what might be the effect of his sister Elizabeth having become a nun, and so incapable, as he thought or had heard, of holding property. How he could have supposed that the effect of his sister's share being no longer capable of being retained by her could be to diminish his share, so as to make it one sixth or one eighth instead of one fifth, it is not easy to understand. He might more reasonably have thought that it would increase it; and perhaps, not being much used to figures and calculations, he fell into the error of supposing for the moment that one sixth or one eighth was a larger share than a fourth, as it is said a member of our assembly in very early times thought he was increasing the toll to be taken by millers, when he succeeded in substituting a twelfth of a bushel for a tenth, as it stood in the original draft of the statute 32 Geo. III., ch. 7.

Whether he thought he was giving to his sister's husband a greater or less share than one-fifth, when he spoke in the letter written on his deed of one sixth or one eighth, it is clear that he intended to convey all his share of the land granted in the patent, whatever it might be. The deed itself imports that, and the letter written on the same paper with the deed, and bearing the same date, and evidently in the same handwriting, puts it beyond question. That writing is to be read by us as if it were in the body of the deed, being contemporaneous, and on the same sheet of paper.

But it has been contended that, even granting that the deed would not have been fatally imperfect in case the two blanks had never been filled up, yet that the fact of their being filled up, as it is admitted they were, after the grantor signed and sealed the deed, would render the deed void. We cannot accede to that, for the deed was not fully executed when it left the hands of the grantor, and he had provided for its being made perfect before delivery, by expressly directing the blanks to be properly filled up according to the truth, which he was unable at the time to do for want of information. No case goes so far as to determine a deed to be void when altered by the consent of the grantor and grantee in a part not material. The case of *Keane v. Smallbone*, (17 C. B. 179,) shews that at the present day at least the courts do not take a course so inconveniently rigid.

We consider that under the deed of the 8th of December, 1804, de Montigny became seised of the estate in these lands which had belonged to John Hay, the patentee.

We have next to determine whether the plaintiff has proved himself entitled to the undivided fifth part granted by the patent to Elizabeth Hay. It was hardly imagined, we dare say, by the plaintiff's counsel, that his claim to that interest could be pronounced good.

Whatever might have been the case if the province of Quebec had always continued undivided, and subject to the same laws regarding real property, we know that some years before the patent issued, and while the land now in question was still in the Crown, the upper portion of Canada was made a separate province, and that its legislature had adopted the law of England as its rule of decision in relation to property and civil rights; and we know that when it did so adopt it, and for ages before, it had ceased to be the law of England that monks or nuns professed were to be regarded as being civilly dead, so that the next heir of any such person should succeed to his property, as if he were naturally dead. But even while such a disability was recognised, Sir William Blackstone informs us "the law of England took no cognizance of profession in any foreign country, "by which is meant a country out of our jurisdiction," because the facts could not

be tried in our courts.”(a) It is the law of the country in which the land is that governs the succession to it, by whatever right, and it need hardly be said that while Elizabeth Hay was seised of this land, which she was some years before she became a nun, and at all times since, there has been no such law existing in this country as rendered her incapable of holding her land because she had devoted herself to religious duties.

She never had by any deed of hers parted with her interest in this land, and had never, so far as appears, authorised any other person or persons to make a conveyance of it in her name. The deed of the 19th of January, 1805, was executed under a mistaken notion that her estate had gone to her heir, or to her brothers and sisters, while she was yet living, which she was till 1838, when she died intestate and without issue, but it could have no effect, and it is not necessary to go further into the history of her share than to say that the plaintiff failed to make title to it, for it would go, as the law then stood in Upper Canada, to her eldest brother, Henry Hay, if he were living at the time, and whether he was or not we do not find stated. If he were not then living, and her share in consequence went to her next brother, John, it could not have passed by any deed executed by him before he became seised. The deed which he did execute in 1805 was clearly intended to pass only his original interest as one of the five patentees, and could therefore have no effect under the doctrine of estoppel to pass any greater or other interest accruing to him afterwards.

In our opinion, therefore, the plaintiff should recover for one undivided fifth of the two for which the defendant endeavoured to make title, but not for the other fifth; that is, not for the share that belonged to Elizabeth.

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(a) See Bla. Com., Vol. I., p. 132; Archbishop of Canterbury's case, 2 Rep. 48 *b*; Rex. v. Lady Portington, 1 Salk. 162; Co. Lit. 3 *b*, note 17, 132 *b*; Thornby v. Fleetwood, 1 Str. 347.



## THE GREAT WESTERN RAILWAY COMPANY V. THE CORPORATION OF THE TOWN OF DUNDAS.

*Covenant—Construction—Principal and surety—Equitable defence.*

The declaration recited that the Desjardins Canal Company were indebted to the plaintiffs in £13,000, which they had agreed to pay before the 1st of January, 1854: that by the 16 Vic., ch. 54, the defendants were authorised to become security to the plaintiffs on account of said company, for certain improvements on their canal to the extent of £15,000; and that after such statute defendants duly covenanted with the plaintiffs that the said company should pay them the said sum of £13,000 and interest, on or before the 1st of January, 1854, and that in default thereof defendants would pay the same.

Defendants pleaded, on equitable grounds.—3. That the plaintiffs had agreed to build for said Canal Company a certain bridge over a channel to be cut by the plaintiffs to their canal, in consideration whereof the company covenanted to pay them £13,000 on the completion of said work, which said sum and the said channel and bridge are the sum and the improvements mentioned in the declaration; that defendants in pursuance of said statute entered into the covenant declared upon as security for the payment by the Canal Company of said sum: that the said agreement of the plaintiffs is subject to a condition precedent, that the work should be approved of by the engineers of the plaintiffs and the Canal Company, &c., who should report when the same were executed, and that no such report was made before this suit. 4. On equitable grounds, that said channel and bridge were not completed before this suit.

The plaintiffs replied, setting out the agreement in full, by which it appeared that the agreement of the Canal Company was to give security for the repayment of the money advanced by the plaintiffs "at the time and in manner as is stated in such securities."

*Held*, on demurrer, both pleas bad, as shewing no equitable defence, for the covenant by defendants was absolute, that the Canal Company should pay on a certain day; and by the agreement the money was to be paid at the time mentioned in the security, not to be dependent on the completion of the work.

DECLARATION, that before and at the time of the making of the covenant and agreement hereinafter mentioned, the Desjardins Canal Company were indebted to the plaintiffs in the sum of £13,000, which they had contracted and agreed to pay to the plaintiffs on or before the first day of January, 1854, with interest thereon from the first day of April, 1853. That by an act of the parliament of this province, entitled "An act to authorise the town of Dundas to grant its security to the Great Western Railroad Company, on behalf of the Desjardins Canal Company, for certain improvements on the said canal," (16 Vic., ch. 54,) it was amongst other things enacted, that it should and might be lawful for the municipality of the town of Dundas, in their discretion, to pass any by-law to authorise the Mayor and Corporation thereof to enter into and become security to the plaintiffs on account and on behalf of the said Desjardins

Canal Company, to the extent of £15,000, for the debt so contracted for the said improvements, and to enter into and execute any and every such instrument or document in writing for carrying out and perfecting such security, as in the judgment of the Mayor and Corporation might be deemed necessary or expedient: that after the passing of the said act of parliament, and in pursuance of a by-law duly passed for that purpose, the defendants entered into a covenant under their corporate seal, for securing the said debt and the interest thereof, and did thereby covenant, promise and agree to and with the plaintiffs, that the said Desjardins Canal Company should and would on or before the said first day of January, 1854, well and truly pay to the plaintiffs the sum of £13,000, together with the said interest, provided that the same should not in the whole exceed £15,000; and that in default of such payment, or any portion thereof, by the said Desjardins Canal Company, the said defendants should and would fully pay, satisfy, and discharge the same: that default was made in payment of the said sum and interest at the time so appointed, and although the defendants afterwards, to wit, on the 17th of December, 1855, paid £10,000 on account thereof, yet the residue still remains due and unpaid.

Defendants pleaded, on equitable grounds.—3. That before the making by them of the covenant sued on the Desjardins Canal Company had, on the 7th of June, 1852, entered into an agreement with the plaintiffs by which the plaintiffs agreed to build a certain bridge over a certain channel, to be made and cut by the plaintiffs to the canal of the said Desjardins Canal Company, in consideration whereof the said Canal Company covenanted to pay the plaintiffs the sum of £13,000 on the completion of the said channel and bridge: (which said sum of £13,000 is the same sum of £13,000, and which said channel and bridge are the improvements on the said Desjardins Canal in the declaration mentioned:) that the defendants afterwards, and in pursuance of the powers conferred upon them under the provisions of the act of parliament in the declaration recited, entered into the covenant and agreement in the declaration mentioned as col-

lateral security and guarantee for the payment by the said Desjardins Canal Company to the plaintiffs of the said sum of £13,000. And the defendants averred that the said agreement of the said Desjardins Canal Company, (to which the defendants' agreement was collateral as aforesaid,) was and is subject to a condition precedent, that the canal, cut, and works referred to in said principal agreement, should be inspected and approved of by a competent engineer to be chosen by the said Desjardins Canal Company, together with the engineer for the time being of the plaintiffs, and that in the event of their failing to agree then that they should call in another engineer to act as umpire, and that the said engineers and umpire, or any two of them, should report when the said canal, cut and works were properly executed according to the true intent and meaning of the said principal agreement. And the defendants further averred that no such report by any engineer chosen by the said Desjardins Canal Company, together with the engineer for the time being of the plaintiffs, or by any engineer and umpire so chosen by them as aforesaid, or by any two of them, had been made before this suit; by reason whereof the plaintiffs were not in equity entitled to call upon the defendants for the payment of the said sum of £13,000.

And for a fourth plea, on equitable grounds, the defendants alleged that the said channel and bridge in the last plea mentioned were not, nor were either of them, completed before this suit.

To the third plea the plaintiffs replied, that the said agreement made between the plaintiffs and the said canal company in the third plea mentioned, was as follows: The agreement was then set out in full; it recited that it was necessary to carry the railroad across the canal: that the canal company desired to improve the canal by making a new channel through Burlington heights: that the filling up of the present channel would be an advantage to the plaintiffs: that it had been agreed that said new channel should be opened, and the present one filled up, so that the railroad might pass over it without a bridge, and that the cost of the change should be borne jointly by the companies in the following proportions:



the canal company to contribute £12,500, and the plaintiffs the residue: that the canal company not having sufficient funds, it had been agreed that the plaintiffs should perform the work, and advance that portion of the expense to be borne by the canal company, "and that the latter company should give security for the repayment of the same at the time and in manner as is stated in such securities." The plaintiffs then covenanted that they would perform with all due diligence, &c., the works mentioned in the plans and specifications thereto annexed, causing no unnecessary delay; and the agreement concluded thus: "And it is hereby further provided and agreed, by and between the respective parties to these presents, that upon the said the Great Western Railroad Company notifying the said Desjardins Canal Company, that the said canal, cut, and works aforesaid are completed, the said the Desjardins Canal Company shall appoint a competent and experienced engineer, who, in company and associated with the chief engineer for the time being of the said the Great Western Railroad Company, shall visit and inspect the same, and in the event of their failing to agree, then they shall call in another engineer or person to act as umpire, and when the said engineers and umpire, or any two of them, shall report the said canal, cut and works, properly, and according to the true intent and meaning of these presents, executed and completed, the same shall be accepted by and shall belong to the said the Desjardins Canal Company, and the said last named company, their successors and assigns, shall for ever be debarred from denying or contesting their due and proper execution, completion, and acceptance."

Having set out this agreement, the plaintiffs demurred to the plea, on the ground that there is no such condition precedent in the said agreement as in the said plea alleged, and that even if there be such condition in the said agreement, the covenant of the defendants is, that the said canal company shall pay absolutely at a certain day.

And they demurred also to the fourth plea, on the ground that the defendants' covenant is absolute, and not dependent upon the performance of the works in the third plea mentioned.

*Cameron*, Q. C., for the demurrer. *Barton*, contra.

ROBINSON, C. J., delivered the judgment of the court.

We are satisfied that neither the third nor fourth plea can be held to be a good defence, legally or equitably speaking.

The covenant entered into by the corporation of the town of Dundas is that they will pay £13,000 on the 1st of January, 1854, if the Desjardins Canal Company should fail to do so. The Desjardins Canal Company, as the plea asserts, may have been only bound to pay on the completion of the work, but still the town could undertake and did undertake to pay on a certain day, without guarding themselves by any such condition, and they are bound by their covenant.

If equity could interfere it would not be by an absolute perpetual injunction against the plaintiffs suing, but only by restraining them till the work was completed, and therefore this can be no good equitable plea in an action under the Common Law Procedure Act.

Besides, the agreement of the 7th June, 1852, between the two companies, as it is set out in the record, shews that what the Desjardins Canal Company stipulated for was that they would repay the money to be advanced by the Great Western Railway Company, *not*, as the plea asserts, *on the completion of the canal*, but that they “should give security for the repayment of the same at the time and in manner *as stated in such securities*,” so that the securities were to fix the time of payment, and it was not to be governed by the completion of the work, though that may have been intended.

Whether we act on legal or equitable principles, we are not to make a contract for the parties where neither fraud nor mistake is pretended.

Judgment for plaintiffs on demurrer.

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REGINA V. THE TRUSTEES OF SCHOOL SECTION No. 27, IN  
THE TOWNSHIP OF TYENDINAGA, IN THE COUNTY OF  
HASTINGS.

*School Trustees—Mandamus—Attachment—Practice.*

A mandamus *nisi* having been issued to school trustees to levy the amount of a judgment obtained against them, no return was made, and a rule *nisi* for an attachment issued. In answer to this rule one trustee swore that he had always been and still was desirous to obey the writ, and had repeatedly asked the others to join him in levying the rate, but that they had refused. Another swore that owing to ill health, with the consent of his co-trustees and the local superintendent, he had resigned his office before the writ was granted.

The court, under these circumstances, discharged the rule *nisi* as against these two, on payment of costs of the application, and granted an attachment against the other trustee, who had taken no notice either of the mandamus or rule.

On the 18th of October, 1860, a writ of mandamus was issued from this court, directed to these school trustees, commanding them to levy and collect, or cause to be levied and collected, from the freeholders and householders of the school section No. 27, in Tyendinaga, a sum of money sufficient for the payment and satisfaction of two certain judgments recovered against the trustees of the said school section by one John Waterhouse, for the building of a school-house for the said school section, or to shew cause to the contrary on the first day of Michaelmas Term then next. The writ had been ordered in Trinity Term, 1860.

Copies of this writ, it was sworn, were personally served on the 23rd of October last, upon William Cross and James Glass, two of the trustees of the said school section, and upon Robert Gillespie, another of the trustees, the original writ of mandamus being shewn to each at the time of service.

In Michaelmas Term last an affidavit was made that on search in the Crown office in Toronto, on the 24th of November, it did not appear that the writ of mandamus had been returned as filed. And the court, upon application of Mr. Sisson, the counsel for Waterhouse, ordered a rule to issue upon the trustees to shew cause why an attachment for contempt should not issue against them for not returning the writ.

In answer to this rule, during this term, Cross, one of the trustees, made an affidavit that he had always been and still was willing and desirous to levy the money necessary



for satisfying the judgments obtained by Waterhouse, as commanded by the writ of mandamus, and had repeatedly requested Glass and Gillespie, the other trustees, or either of them, to unite with him in making a rate for that purpose; that he had done this both before and after the mandamus came to him, but that they had always refused, and that he could not alone impose and levy the necessary rate. He made a return also to the writ, under the corporate seal, referring to his affidavit for his reason for not executing the command of the writ, and his affidavit and return were annexed to the mandamus.

James Glass, another of the trustees, in answer to the rule *nisi* for attachment, filed an affidavit, to the effect that, being in very ill health at the time of the election of school trustees in January, 1860, he declined the office, protesting that he could not serve in it on account of the state of his health, but that he was nevertheless chosen: that his ill health continuing, he solicited permission to resign, not being able to discharge any of the duties; and he annexed a letter received from his co-trustees, Cross and Gillespie, dated the 9th of February, 1860, allowing him to resign for the reason given, and another letter from the local superintendent, dated the 14th of March, 1860, consenting to his being released from his duties as school trustee.

Mr. Glass, however, took no notice of the writ of mandamus till he made his affidavit on the 4th of February, 1861, nor Mr. Cross till he made his affidavit on the 9th of February, 1861.

Mr. Gillespie did not appear to have taken any notice of either the mandamus or the rule *nisi* for attachment.

*Crombie* appeared for the defendant Glass. *O'Hare* for defendant Cross.

ROBINSON, C. J., delivered the judgment of the court.

Both Cross and Glass failed to pay due obedience to the writ by returning to the court the reasons which had prevented their doing what they had been directed to do. This may have arisen from their relying on the sufficiency of the

reasons, and not being advised of the steps which it was still incumbent on them to take.

As to them, therefore, we may discharge the rule *nisi* for attachment, on their paying the costs of the application.

As to the other defendant, Gillespie, we grant the attachment. We might have ordered a peremptory mandamus, when no return had been made in due time to the first; but an attachment being moved for it is proper to grant it against the member of the corporation (Gillespie) who has been guilty of the contempt of wholly disobeying the mandamus, neither doing the act, nor manifesting any readiness to do so, nor assigning any cause for not doing it.

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During this term the following gentlemen were called to the bar:—PETER O'BRIAN, TIMOTHY BLAIR PARDEE, WILLIAM HEPBURN SCOTT, CHARLES FREDERICK GOODHUE, ALEXANDER BRUCE, JOHN ALEXANDER MACKENZIE, GEORGE WILLIAM DESVŒUX, GEORGE SUDLOW PAPPS, CORNELIUS DANFORD PAUL, CHARLES INGERSOLL BENSON, JAMES WINDEAT.

EASTER TERM, 24 VICTORIA, 1861.

*Present:*

THE HON. ARCHIBALD McLEAN, J. (a)

“ ROBERT EASTON BURNS, J.

**THE NEW BRUNSWICK OIL WORKS CO. v. PARSONS ET AL.**

*Sale of goods—Attempt to defraud customs—Complicity of defendants—Set-off.*

Plaintiffs had been in the habit of selling oil to defendants, the terms being payment on delivery free on board at St. Johns, New Brunswick, and double invoices had been frequently sent by them, one giving the real selling price and the other less. It was not clear whether this was done at defendants' request or not, but they had written to the plaintiffs on one occasion, in giving an order, to “send invoices as before.” In an action for the price of certain oil defendants endeavoured to set off the value of eight barrels which they had previously ordered and paid for, but never received. It appeared that when shipping this lot the plaintiffs' agent wrote to defendants “recommending” them, in order “to lessen the expenses, and especially in the duty,” to send the bill of lading to the plaintiffs' friends, R. & S., at Portland, with instructions to include it in the same bond and entry with other lots sent to Messrs. J. T. & Co., at Montreal, forwarding agents, pay the duties, and forward to them. Plaintiffs accordingly wrote to R. & S. to do so, and this with other lots consigned to R. & S. were entered upon an invoice of the whole furnished by the plaintiffs under the selling price, and seized by the collector at Montreal.

The jury were directed that if the eight barrels were undervalued by the plaintiffs without defendants' privity or consent, in order to defraud the customs, the defendants might set off the price which they had paid for them, but that if defendants were concerned in the fraud they could not. *Held*, that the direction was right, and that the evidence warranted a verdict for the plaintiffs.

The plaintiffs sued on the common counts for goods sold and delivered, money paid, and account stated.

*Pleas.*—1. As to £5, payment into court, as being sufficient to satisfy the plaintiffs' claim, and as to the residue not indebted.

2. To the residue, payment before action. 3. Set-off.

At the trial, at Toronto, before *Robinson*, C. J., the particulars of the plaintiffs' claim appeared to be for twelve

(a) The Chief Justice was absent during this term owing to indisposition.



barrels of oil furnished in February, 1859, and fifteen barrels in March, 1859, besides some bank charges on a returned draft. It appeared from the evidence that in the summer of the year 1858, the defendants, who carried on business in Toronto, applied to the plaintiffs, who carried on their business in New Brunswick, to become agents for the sale of the plaintiffs' oil at Toronto. The plaintiffs declined that proposition, but informed the defendants of the terms upon which they were willing to deal with them, and which were that the company did not undertake to deliver their oil abroad at any price, but would deliver it free on board at St. Johns, New Brunswick, for cash, or for such negotiable paper as could be used in New York. After this took place the defendants ordered oil from the plaintiffs, and various shipments were made, and invoices furnished to the defendants, who themselves entered the goods at the customs in this province and paid the duties. Double invoices were furnished sometimes, the one shewing the price to be less than the other. Whether this took place on every occasion was not very clearly made out, nor was it very satisfactorily shewn whether there was any agreement between the parties that such invoices should be sent by the plaintiffs. The plaintiffs' witness stated that they were sent to the defendants at their own suggestion, to use or not as they chose, and as he supposed with a view of defrauding the revenue. He further stated that he did not consider the invoices to be false, though he could not explain why, further than that the oil had not yet acquired any well known marketable value or price, being a new article of commerce. Then, on the other hand, the defendants were shewn to have written to the plaintiffs on the 26th of November 1858, ordering a further supply of oil, using this expression, "Send invoices as before," and this expression they could not explain, though the writer of the letter was examined as a witness.

The fifteen barrels mentioned in the particulars of demand were paid for by a bill of exchange for that amount, and were not in question now. The twelve barrels of oil also mentioned in the particulars were duly received by the defendants in Toronto, and the plaintiffs drew a bill of exchange on the

defendants for the price, which the defendants refused to accept or pay, under the following circumstances :

On the 4th of February, 1859, the plaintiffs shipped at St. Johns to the defendants eight barrels, and by letter of that date apprised the defendants of it, and at the same time drew a bill of exchange for the price, which the defendants accepted and paid. Those eight barrels the defendants never received. In the letter of the 4th of February the plaintiffs' agent wrote respecting these to the defendants in these words :

"To lessen the expenses, and especially in the duty, I recommend you to send your bill of lading to our friends Rhymas & Starr, Portland, with instructions to include your lot in same bond and entry with other lots sent to Messrs. Jacques, Tracy, & Co., Montreal, forwarding agents, to pay the duties and forward to you."

On the 11th of February the defendants wrote to Messrs. Rhymas & Starr as follows :

"J. D. Spurr, Esq., manager New Brunswick O. W. Company, instructed us to write you with instructions to include eight casks oil, marked to our address, with some other lots, and consigned to Messrs. Jacques, Tracy & Co., Montreal, with directions to them to enter it with the rest. Forward the amount of duties to us. Your attention to the above will oblige and save us some expense."

Again, on the 19th of February, the defendants wrote to Messrs. Rhymas & Starr as follows :

"We wrote you a few days since requesting you to forward ten barrels Albertine oil, marked to our address, to Messrs. Jacques, Tracy & Co., Montreal, to enter and forward to Toronto. It was shipped on the 4th of February from St. Johns, per schooner *Pearl*, of Portland. If it has arrived will you please forward at once and advise us of its arrival. We are very much in want of it, and your prompt attention will be of great service to us."

It appeared that those eight casks were shipped with a larger quantity to different persons in Montreal and Hamilton, comprising altogether eighty-five packages. The plaintiffs sent an invoice of the whole eighty-five packages, for entry at the customs, as consigned to Messrs. Rhymas & Starr, and to be forwarded by Grand Trunk Railway Co., to Messrs. Jacques, Tracy & Co., Montreal, for account

subject to order of shippers. The whole quantity was invoiced at seventy cents per gallon, and the defendants had always paid at the rate of ninety cents per gallon for all they received, and they paid also for these eight casks at the same rate by paying the bill of exchange drawn upon them. The oil arrived at Montreal, and was there seized by the customs as undervalued, and the defendants never got it, nor the plaintiffs.

Under the circumstances mentioned the defendants contended that the plaintiffs were liable for the loss of those eight barrels, and that they had a right to set off the sum which they had paid for them in this action brought for the price of the twelve barrels.

The learned Chief Justice directed the jury, that if they thought upon the evidence that the plaintiffs endeavoured by an arrangement of their own to defraud the customs, not at the instance or with the privity and consent of the defendants, so that the defendants, by the fault of the plaintiffs, and by no fault of their own, lost the oil, then the defendants should be allowed to recover back so much as they had paid for those eight barrels by way of set-off against the price of the twelve barrels. But that if the jury believed the defendants were in any way concurring or conniving, or privity and assenting to the attempt to enter by an untrue invoice, then they could not complain of the loss, and having paid for the eight barrels under such circumstances they could not recover the money back, and consequently could not set it off; and in such case the plaintiffs were entitled to recover the price of the twelve barrels not paid for.

In dealing with the question, the jury were also directed to consider the effect of the invoice and consignment of the oil to Messrs. Jacques, Tracy & Co., of Montreal, subject to the plaintiffs' orders, which applied to the whole eighty-five packages, and so covered the eight addressed to the defendants; that if the plaintiffs' object was to retain a control over the property after its arrival at Montreal, then with respect to this particular lot it could not be said to have been delivered at St. Johns, and in that case the act of entry at the customs might fairly enough be said to have



been the plaintiffs' own act, for which they alone were responsible.

The jury found for the plaintiff for the whole twelve barrels, £125.

*Adam Crooks* during last term obtained a rule calling upon the plaintiffs to shew cause why the verdict should not be set aside, and a new trial had, on the ground that the verdict was contrary to law and evidence, in this, that it appeared from the evidence that the plaintiffs were guilty of an attempted fraud on the revenue for part of the oil, and therefore could not recover for any part of their claim in this action, for the fraud would vitiate the whole; or why the verdict should not be reduced by deducting the sum of £100, the price of the eight barrels of oil which were lost to the defendants by the unauthorised act of the plaintiffs; or why, upon payment into court by the defendants of the sum of £25, there should not be a new trial in respect of the set-off for the eight barrels, on the ground already mentioned. He cited *Cundell v. Dawson*, 4 C. B. 376; *Ritchie v. Smith*, 6 C. B. 462.

*Freeland* shewed cause, and cited *Leith v. O'Neill*, 19 U. C. R. 233; *Orr v. Spooner*, Ib. 601.

McLEAN, J.—It appears by the evidence that the plaintiffs' manager in New Brunswick was quite willing by furnishing a false invoice to assist the plaintiffs in attempting to defraud the revenue of this province, if they thought proper to do so; and if this action were for the price of any goods lost or seized in consequence of such attempt, I should have no difficulty in holding that in consequence of the participation in the intended fraud the plaintiffs could not recover. The furnishing a false invoice by putting the price at a much lower amount than the true price at the market in which the goods are purchased is a very common mode of assisting in such frauds. Without such invoice or a feigned one the attempt could not be made, and the former is much more convenient than the latter, and probably more easily proved, if any difficulty on that point ever occurs amongst

persons whose consciences allow them to cheat the public by defrauding the revenue. This, however, is not an action for goods with respect to which any attempt has been made to enter at the custom house at a price inferior to the price actually paid in the foreign market. The price of the eight barrels which have been lost to the defendants has been paid. The plaintiffs were entitled to be paid on delivery of their oil on board of a sea-worthy vessel at St. Johns, New Brunswick, but a question might arise as to their right to recover if their agent took upon himself to give directions as to the forwarding from Portland to Montreal, and the entry at the custom house there of such goods, so that the same were seized and became forfeited; or if the goods were seized on an invoice being presented which had been prepared for the fraudulent purpose of deceiving the customs authorities. In this case, however, the defendants themselves, by their letters to Messrs. Rhymas & Starr, at Portland, gave directions to have the goods forwarded to Messrs. Jacques, Tracy, & Co., and they must have sent to the same parties the invoice which they wished to have presented at the custom house for the payment of duties. It is true the plaintiffs' agent recommended the course pursued, but he gave no orders or instructions to any body with respect to the oil. The owners, the defendants, are the only persons who gave any orders with respect to their goods, and that they were quite willing to avail themselves of Mr. Spurr's recommendation to *lessen the expenses, and especially in the duties*, is quite evident from the fact that in the course of 15 days, between the 4th of December, when the goods were shipped at St. Johns, and the 19th, the defendants wrote twice to Messrs. Rhymas & Starr about forwarding the goods to Jacques, Tracy & Co., and directing them to pay duties and forward from Montreal; but if the plaintiffs' agent had joined the defendants in any acts, and they acted jointly in the endeavour to lessen the expenses, and especially in the duties, the payment of the full value of that parcel of goods to the plaintiffs would put it out of the power of the defendants to raise any question respecting them. They could not call upon the plaintiffs to refund the money they

had received in payment of their goods, because the goods had been lost to them in consequence of proceedings in which they had themselves participated to defraud the revenue.

Then as to the last twelve barrels, which they wish to meet by the former payment on goods that were lost to them, the transaction appears to be quite distinct from the other. By the contract with respect to them they were payable by defendants on delivery on board at St. Johns. At that time the bill for the value of the eight barrels lost had been paid, and that transaction was ended. The new contract with respect to the twelve barrels could not depend on any matter connected with a former contract for the sale of goods which had been closed by payment.

When the eight barrels shipped at St. Johns on the 4th of February arrived at Portland, they were subject to the defendants' order. They ordered them to be sent to Montreal to particular parties there, with instructions as to the entry and forwarding. How can they get rid of that as an interference on their part with the goods as the owners? If they afterwards were lost contrary to the expectations then entertained, the defendants can not throw the loss upon others, or get rid of the responsibility of their own acts.

It appears to me that the verdict is right according to the evidence, and that there is no principle of law involved which can prevent the plaintiffs recovering the amount under the circumstances proved.

BURNS, J.—The defendants do not in any way complain of the charge of the Chief Justice, and indeed they could not.

The first part of the defendants' rule is based upon the proposition that the whole of the dealings between the parties are to be considered one transaction as it were, and payments made on account, although the articles may have been ordered at different times, and because the plaintiffs have rendered some accounts since all the dealings closed, treating the matter in that way, and because the bill of particulars attached to the record carries out that idea; and then, if so,



that the fraud which they contend to be established against the plaintiffs vitiates their right to claim any part of the demand. Suppose it to be as defendants contend, that an account was rendered after all the dealings closed shewing what is alleged, though as to that the plaintiffs contend that such an account, though looked over at the trial, yet was not used or put in evidence, that would not in my opinion make any difference. When we look over the different transactions, we see that for each particular shipment a bill of exchange was drawn on the defendants for payment of that quantity, thus rendering each transaction an isolated one, quite independent of any other. Also the act of entry at the customs is distinct, for the plaintiffs had nothing whatever to do with any entry except in respect of the eight barrels. As to all the others, the defendants themselves did that. There is therefore no ground for saying that the plaintiffs were not entitled to a verdict for something, and the next consideration is in regard to the eight barrels which were seized.

I have looked at the cases cited by Mr. Crooks, *Cundell v. Dawson*, (4 C. B. 376,) and *Ritchie v. Smith*, (6 C. B. 462;)—and the law as respects the participation by both parties in an act or agreement having the effect of contravening the law, and so disabling either of them from asking a court to enforce it in any way, was properly enough stated to the jury by the Chief Justice. Then the only question left was in what light the evidence would strike the minds of the jury as to whose fault it was those eight barrels were lost. They thought the fault lay with the defendants. Before we could interfere we must see that such finding is wrong, and without evidence, or at all events that the evidence so much preponderates against the finding, that it evidently leads the mind to the conclusion that on another occasion the verdict would in all probability be the other way. Now looking at the facts, we see that defendants were furnished with double invoices, and as the witness swore at their suggestion. Whether they in entering at the customs used the lesser price we are not informed. We see by the defendants' letter that they asked for "invoices as before," whatever that may mean. As regards the eight barrels, we

find the plaintiffs suggesting to the defendants to have them consigned<sup>to</sup> to Messrs. Jacques, Tracy & Co., Montreal, through the plaintiffs' friends, Messrs. Rhymas & Starr, of Portland, for the purpose of lessening the expenses, and *especially the duty*. Then we find the defendants acting upon that, and giving directions accordingly. We are not informed that any particular price was mentioned to the defendants for entry at the customs, but we see that the plaintiffs suggested to them the means of saving both expenses and duty, and we see the defendants writing to those friends of the plaintiffs: "Forward the amount of duties to us. Your attention to the above will oblige and save us some expense." It was not at all an unnatural supposition of the jury that the defendants, whether they were informed or not of any particular price which was intended to be given for entry, were perfectly well aware that whatever was done by or through the plaintiffs' friends, either in respect of expenses or duties, they were to be benefitted by it. On this evidence, it is out of the question to say that the plaintiffs' act, assuming that act caused the entry to be made, or rather attempted to be made, was not an authorised act on their part.

With respect to the point whether the goods were subject to the plaintiffs' orders at Montreal, and so may be said not to have been delivered at St. Johns, no doubt the legal effect of the invoice and bill of lading of the 85 packages, if looked at alone, would be that it would be construed no delivery till they had given their orders. Here, however, we find the eight packages addressed to the defendants with others, but as regards those eight packages the plaintiffs, on the day they were shipped, 4th February, 1859, sent the defendants an invoice and bill of lading of them, and suggested to the defendants to send that bill of lading to the plaintiffs' friends, in order to include it in the same entry in bond with others, and then to be sent to Messrs. Jacques, Tracey & Co., to pay the duties and forward to the defendants, and the defendants adopt this mode. I apprehend the delivery was complete in the defendants, for though the legal construction of the invoice and bill of lading be that the

property, while passing on from St. Johns to Montreal, was subject to the shippers' orders, yet on the same day the property was shipped the plaintiffs sent the bill of lading of the eight barrels to the defendants, and suggested to them a source whereby to get the property at a lesser expense and duty than they had been in the habit of paying, which makes out a complete delivery order, and thus still amounting to a delivery at St. Johns.

I think the rule should be discharged.

Rule discharged.

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### MERRITT V. JOHN NEVIN AND PETER NEVIN.

*Sale of goods—Action for deceit as to title—Right to recover costs of suit brought by purchaser.*

Defendants sold to the plaintiff and received the purchase money for some wheat which they represented to be their own, but which belonged to one B., who obtained it from the railway company in whose cars it was. The plaintiff sued the company for delivering it to B., and the action was referred and decided against him, defendants being present at the arbitration, but it was not shewn that they were otherwise concerned in the suit. Plaintiff then sued the defendants for the deceit, claiming as special damages the costs of this unsuccessful action.

*Held*, that such costs could not be recovered.

The declaration was special, and stated that on the 21st of December, 1859, the defendants represented to the plaintiff that they had, as of their own property, at a particular place, 600 bushels of wheat, and offered to sell the same, and then did contract to sell and deliver the same to the plaintiff for \$800: that the plaintiff paid that sum to the defendants as the full purchase money, and the wheat was delivered to the plaintiff, whereas the wheat was not the defendants' property, but was the property of one Enos Bunnell, who took and appropriated it to his own use. The plaintiff averred that in and about endeavouring to maintain his right to the wheat, and in and about a certain action brought in respect thereof, he was put to and laid out and expended a large sum of money, to wit \$400. Common counts were added.

Defendants pleaded severally, each denying any contract



with the plaintiff as alleged, or that the wheat was the property of Enos Bunnell as alleged; and never indebted.

The trial took place at Brantford before *Draper, C. J.*, and the facts of the case appeared as follow: The defendants represented to an agent of the plaintiff who purchased wheat for him, that they had a quantity of wheat, amounting to 610 bushels, contained in two cars at the Carronbrook station on the Buffalo and Lake Huron railway. The plaintiff's agent purchased the wheat and paid them \$542 97c. for it. It turned out afterwards that the wheat belonged to Mr. Enos Bunnell, it having been purchased with Bunnell's money by one of the defendants, who acted for him as an agent in buying wheat. Bunnell got the wheat, whereupon the plaintiff brought an action against the Buffalo and Lake Huron Railway Company for delivering the wheat to Bunnell after it had been placed in the company's possession to be forwarded and delivered to the plaintiff. The action was referred to arbitration, and the arbitrators decided in favour of the company, and against the plaintiff's claim. Both the defendants were present at the arbitration.

The present action was brought to recover back the money paid by the plaintiff to the defendants, and for the costs which the plaintiff was put to in bringing that action, and which he had to pay the company's solicitor for costs of defence.

It was proved that the costs paid by the plaintiff to the company, as costs of their defence, was \$187 12c., and it was said that the plaintiff's own costs in his action would be as much more.

The jury gave a verdict for the plaintiff for his money and interest, \$588 10c., and for the bills of costs, \$374 24c.

The Chief Justice reserved leave to the defendants to move the court to reduce the verdict by both or either bill of costs, if the defendants were not liable in this action for the costs of that suit which the plaintiff brought and failed in.

*N. Kingsmill* obtained a rule *nisi* during last term according to the leave reserved. He cited *Short v. Kalloway*, 11 A. & E. 28; *Tindall v. Bell*, 11 M. & W. 228; *Forsyth v. McIntosh*, 9 C. P. 492.

*E. B. Wood* shewed cause, and cited *Williams v. Burrell*, 1 C. B. 402, 425, 427, 433; *Blyth v. Smith*, 5 M. & Gr. 405; *Mayne on Damages*, 25-30.

McLEAN, J.—No evidence was given that the action in which the costs were incurred had been brought by the plaintiff at the instance of the defendants for the purpose of maintaining his right to the wheat, nor does it appear in any way that it was an action brought against the plaintiff which the defendants, as the sellers of the wheat, were equitably bound to defend on receiving notice to do so. All that does appear is that an action was brought against the Buffalo and Lake Huron Railway Company, as it is alleged, in reference to the wheat, in which action the plaintiff was unsuccessful. Leave was reserved to the defendants to move to reduce the verdict by striking off the amount of the costs.

If the jury had rendered additional damages against the defendants for practising so gross a deceit, even to the amount of the costs, the verdict would scarcely have been objectionable on that account; but the amount does not appear to have been allowed as a sum disbursed in some action to which the plaintiff was necessarily exposed, or which he was obliged to bring to defend his interests in consequence of the deceit of the defendants, and their fraud in selling to him property not their own, of which action they had received due notice.

If it were quite clear that the action in which the costs are alleged to have been incurred was one of that description, I should find it difficult to hold that the plaintiff was not entitled to recover the full amount of costs incurred by him in that action. But in the present case there is nothing to shew what the action was, or why it was commenced, or whether the defendants were or were not interested in it, or legally or equitably bound to pay or bear the costs of it.

In the case of *Sandback v. Thomas*, (1 Stark. N. P. C. 306,) which was an action on the case for maliciously holding to bail, Lord Ellenborough held that if a person by his act subject a party to a legal liability to pay a sum of money to another, he is bound to indemnify against such payment.

The same principle as to the right to recover such damages in a proper form of action is recognized in the case of *Holloway v. Turner* (6 Q. B. 928); *Lewis v. Peake* (7 Taunt. 153, 2 Marsh. 431,) and other cases.

The declaration in this case does not set forth in sufficient terms any ground of action for damages beyond the actual deceit in selling the wheat to the plaintiff and taking payment for it as if it were their own, and therefore the plaintiff cannot be allowed to recover as damages the costs of an action for which no sufficient foundation is laid.

In a very recent case, *Pow v. Davis*, (4 L. T. Rep. N. S. 399,) the court decided that the plaintiff was not entitled to recover costs of a former action which he had defended at the instance of the defendant in that case. The defendant, Davis, professing to act under the authority of the owner, agreed to let a house to the plaintiff for a term of years at a certain rent, and plaintiff was let into possession. The owner of the house refused to ratify the agreement, and brought an action of ejectment and dispossessed the plaintiff. The defendant was aware of that action, and by his advice, and under his direction, it was defended. The plaintiff after being evicted brought an action against defendant, and sought to recover damages from defendant for being evicted, and the costs of the action brought against him, which were made a special ground of damage in the declaration, but the court held that the plaintiff could not recover the costs of that action.

The rule, I think, must be made absolute, to reduce the verdict to \$588 10c., by striking off the amount of costs included in it.

BURNS, J.—The cases cited by Mr. Wood are very different from the present. The right of the plaintiff to claim the costs of the action he brought against the railway company is not rested upon any contract of indemnity between the plaintiff and defendants, either express or implied, in respect of the wheat, which would cover or embrace costs and expenses the plaintiff might be put to in asserting title, nor upon any warranty that the defendants gave that the wheat was their property. It is rested



entirely upon the point that the defendants made a false representation as to their ownership, and consequently it was a fraud upon the plaintiff. Granted that it is so, still I do not see that it warrants the plaintiff in undertaking an action without being sanctioned to do so in some way by the defendants. It is said they were present at the arbitration, but it is not shewn that they directed the action to be brought, or in fact knew any thing of it until they were before the arbitrator, when they were called as witnesses. It would seem, so far as we can judge from the evidence, that the foundation of the plaintiff's action against the railway company was that there had been a delivery by the defendants to the plaintiff, and by the plaintiff to the company for the purpose of carriage and delivery to him. The two defendants, after the transaction of bargaining with the plaintiff's agent about the wheat, quarrelled, and one of them caused the wheat to be sent to the true and proper owner. Under these circumstances, it behoved the plaintiff to see well to the ground he stood on before he ventured to bring an action against the railway company. It is said the declaration is special claiming the costs, and that fact should entitle the plaintiff to a favourable consideration, but that is repudiated in *Holloway v. Turner*, (6 Q. B. 928.) We had not very long since to consider a similar question of costs in *Taylor v. Strachan*, (16 U. C. R. 76.) See *Pow v. Davis*, (4 L. T. Rep. N. S. 399.)

I think the rule must be made absolute to reduce the verdict by striking out \$374.24.

Rule absolute.

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#### READ V. WEIR.

*Arbitration—Remitting matters back—C. L. P. A., sec. 164.*

The effect of the C. L. P. A., sec. 164, enabling the court to remit matters back to the arbitrator, is not to alter in any way his power or authority, and the court therefore refused to interfere upon an objection not apparent on the face of the award, that in considering the nature of the work claimed for as rock or stone excavation he had not conformed to the engineer's certificate, which it was contended bound the plaintiff.

This cause was carried down to the assizes held at Niagara,

in the fall of 1860, and a verdict taken for the plaintiff for £2500, subject to a reference to Mr. Miller, of St. Catharines, a barrister, by consent of the parties.

Mr. Miller made his award on the 23rd of March, 1861, and thereby awarded to the plaintiff £2308 12s. 3d.

*Eccles*, Q. C., during last term, moved to set aside the award, or to refer the matter back to the arbitrator under the following circumstances:—The defendant Weir was a contractor under Messrs. Gzowski & Co., the constructors of the western section of the Grand Trunk Railway, and had sublet a portion of his work to the plaintiff. Weir was bound in his contract with Gzowski & Co. to abide by the determination of the engineer appointed to superintend and measure the work, both as to measurement and as to what constituted rock excavation and earth excavation. There was no difference between the parties as to the measurement, but the dispute was in respect to what constituted rock excavation. The defendant had been paid by Messrs. Gzowski & Co., under the engineer's certificate, and he contended that the certificate bound this plaintiff also, because in the plaintiff's contract to do the work he bound himself to take payment according to the measurement, and also what the engineer determined should be considered rock and what should be earth excavation.

The arbitrator furnished a paper, shewing specifically what number of yards he considered rock, and what he considered earth excavation, but what evidence he acted upon was not shewn. The difference between the two at the contract prices when computed was very nearly the whole amount of the award.

BURNS, J.—It is not complained against the award that there is any thing wrong upon the face of it, nor is any complaint made against the arbitrator, but the complaint is made upon the broad ground that the arbitrator acted illegally in not holding the plaintiff bound to the legal terms and meaning of the contract.

I think the case of *Hodgkinson v. Fernie*, (3 C. B. N. S. 189) is decisive against granting any rule. In that case

the court was asked to set aside the award made under a reference just as in this case, or to refer the case back to the arbitrator, because the arbitrator had improperly allowed a sum to be recovered as damages which it was contended the plaintiff had no legal right to recover. The effect of the recent provision for referring back matters to an arbitrator, where there is either a mistake in law or fact is much considered. *Cockburn*, C. J., says "Without entering into a consideration of the merits of the case, or enquiring whether or not the arbitrator was right in allowing the sum in question as damages in the action, I am of opinion that we have no jurisdiction."

The whole court were clearly of opinion that the new provisions did not vary the law so as to alter the power and character of the arbitrator, and enable the court to say that his decision shall no longer be final either as to the law or the facts. The rule must be refused.

*McLean*, J., concurred.

Rule refused.

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### REGINA V. FITZGERALD.

*Quarter sessions—New trial—C. S. U. C. ch. 113.*

Defendant was convicted of an assault at the quarter sessions and fined, but during the same sessions he obtained a new trial on his own affidavit, and was acquitted at the following sessions. *Held*, that the quarter sessions had authority to grant such new trial, and that this court could not interfere.

An indictment was found at the general quarter sessions held at Perth for the united counties of Lanark and Renfrew, in March, 1860, against the defendant for assault and battery, alleged to have been committed on the 1st of December, 1859. The defendant was convicted on the 14th of March, 1860, and the same day sentenced to pay a fine of one shilling and the costs, and to stand committed until the fine and costs were paid. On the second day after the sentence was pronounced the defendant made an application to the sessions for a new trial upon his own affidavit, stating that he was not guilty of having committed the assault, and complaining that the evidence offered against him was contradicted, and that the jury did not properly weigh the



evidence. The court set aside the conviction, and ordered a new trial, with costs to abide the event. The defendant was again tried at the sessions held in June, 1860, and was then acquitted.

These proceedings having been removed by the Crown upon a writ of *certiorari* into this court, *R. A. Harrison* moved on behalf of the Crown for a rule calling upon the defendant, Fitzgerald, to shew cause why all the proceedings subsequent to the judgment and sentence of the court which took place at the March sessions, 1860, should not be quashed and set aside as illegal, and why he, the defendant, should not be remanded to the custody of the sheriff of the united counties of Lanark and Renfrew, to be detained in the common gaol of the said united counties, under the judgment and sentence of March, 1860, until he should be therefrom discharged by due course of law, or why the defendant should not be otherwise dealt with in the premises as to this court might seem meet and proper.

BURNS, J., delivered the judgment of the court.

Until the passing of the statute 20 Vic., ch. 61, a new trial could not be granted in any criminal case in Upper Canada, tried at a court of oyer and terminer or gaol delivery, or quarter sessions. Under that act, now continued by the Consolidated Acts for U. C., ch. 113, a person convicted at or before a court of oyer and terminer or gaol delivery, may make application to one of the superior courts of common law for a new trial, provided he does so not later than the last day of the first week of the term next succeeding the court of oyer and terminer or gaol delivery at which the conviction took place. The evident meaning of the legislature was that the court of oyer and terminer or gaol delivery should perform all its functions with regard to judgment and sentence following a conviction, with due respect to circumstances in each case, for the power of entertaining the application for a new trial is vested in another court, to which is not confided by the act the power of giving the judgment or passing the sentence.

With respect to the court of quarter sessions the power to entertain the application is vested in the same court, and the question therefore is at what time the application should be entertained, or when is it limited, seeing that the act itself is silent with regard to it. It is quite clear that the sessions possess the same power that the superior courts do of altering their judgments during the same sessions or term, and for that purpose the sessions, as the term, is all looked upon as but one day.—*The Inhabitants of St. Andrew's, Holborn v. St. Clement Danes* (2 Salk. 606). The judgment and sentence therefore pronounced in the present case was no obstacle against the sessions entertaining an application for a new trial at the same sessions, which was the case in this instance.

Then with regard to the grounds upon which the new trial was ordered, it is said that was done upon the affidavit of the defendant, and therefore was contrary to the decisions of this court (a), and also of the Common Pleas, upheld in appeal, in the case of the *Queen v. Grey*. The construction given to the act is that the power of moving for a new trial is confined to points of law and questions of fact arising upon the evidence given at the trial, and not upon what may be alleged upon affidavits supplied afterwards, and no doubt the courts of quarter sessions ought to be governed by the decisions upon the subject. We must suppose in general those courts do so, and in the case before us it may have been so acted upon, for although the affidavit be returned to this court, it is not shewn that the court of sessions made the order for a new trial solely upon the affidavit. The evidence given at the trial does not appear before us in any way, and it may be that a question of fact arose upon that evidence sufficient to satisfy the court that it was right to order a new trial, and if that be so the filing and using the defendant's affidavit would amount to nothing. No authority has been vested in this court to review the judgment of the quarter sessions where a new trial has been ordered. It is only where the sessions have confirmed the conviction that the convicted party may appeal.

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(a) See *Regina v. Crozier* 17 U.C.R. 275; *Regina v. Oxentine*, *ib.* 295.

As the case stands at present there is no ground for saying that it clearly appears the sessions have transgressed their jurisdiction; it is only surmised that they have not followed the rule established in the superior courts of not granting new trials in criminal cases upon affidavits merely, and this comes now before us very nearly a year after the defendant was acquitted upon the new trial granted to him.

There should be no rule.

Rule refused.

# IN THE MATTER OF TABER AND THE CORPORATION OF THE TOWNSHIP OF SCARBOROUGH.

*By-law to levy rate for schoolhouse—Extrinsic objections—Refusal to quash—How the desire of ratepayers must be expressed—Consol. Stats. U. C., ch. 64, sec. 34, sec. 27, sub-sec. 10.*

The township council, by resolution, agreed to lend to the school trustees, out of the clergy reserve fund, a sufficient sum to build a schoolhouse, taking as security their debentures. This arrangement was made by the trustees without any reference to the ratepayers, but at the next annual school meeting, at which the applicant was present, the matter was discussed, and the contract and plans for the building examined. The council subsequently, on the requisition of the trustees, passed a by-law to raise a sum for school purposes, which was required to pay the interest of these debentures and redeem one of them. The applicant moved to quash this by-law, objecting that the loan effected by the trustees without the consent of the ratepayers was illegal; but it appeared that the schoolhouse had been finished and occupied, many of the ratepayers swore that they were satisfied with what had been done, and the affidavits were contradictory as to how far the applicant had acquiesced in the proceedings.

The by-law not being illegal on the face of it, the court under these circumstances refused to interfere.

*Quære*, whether under Consol. Stats. U. C., ch. 64, sec. 27, sub-sec. 10, and sec. 34, the concurrence of the freeholders and householders required to enable the trustees to call upon the council to levy money for the purchase of a school site, &c., can be expressed at the annual school meeting, without notice that the question will then be brought up.

*Morphy* obtained a rule *nisi* to quash a by-law passed to levy money required for school purposes.

*Helliwell* shewed cause. *Burns* supported the rule.

The application depended upon affidavits, being grounded upon objections not apparent on the face of the by-law, and the facts of the case sufficiently appear in the judgment.

BURNS, J., delivered the judgment of the court.

It seems from the affidavits, which are very numerous,



that in the year 1857 the inhabitants of school section No. 9 desired to change the site of the schoolhouse, and a special meeting was called of the freeholders and householders of the section to decide the point. A site was determined upon, and the trustees instructed to build the schoolhouse at the earliest opportunity. The acre of land then selected was paid for and conveyed to the trustees, and the deed of conveyance registered. I do not understand the complaint of the relator to attack those proceedings, but what was done afterwards.

In the fall of the year 1859, the then trustees made an arrangement of this kind with the council of the township. The council agreed by resolution of the 15th of October, 1859, to loan from the proportion of the clergy reserve fund a sum sufficient to build the schoolhouse, taking in security debentures to be issued by the school trustees, redeemable at stated times. The trustees immediately advertised for tenders. A contract was entered into to have the building erected and completed by the 1st of August, 1860.

At the annual general school meeting in January, 1860, the proceedings of the trustees were made known to those present, among whom was the complainant. The contract for the building of the schoolhouse was read, the plans exhibited and examined, and the matter discussed. On the one side it is asserted that the complainant assented to the report of the trustees, and on the other that is denied.

After this the trustees made a requisition to the council to levy by rate on the ratepayers of the section the sum of \$550 for school purposes. Part of this sum was for the purpose of paying the interest falling due on the debentures, and to redeem the first one.

The applicant swore that the application was not made from any malicious or vindictive motive, but solely that he, and the other ratepayers and householders of the school section, might have at some special meeting, or at the annual meeting in January, 1861, an opportunity of being heard in the matter.

The council of the township on the 20th of August, 1860, in accordance with the requisition of the trustees, passed a by-law assessing the school-section for the sum of \$550.

It is this by-law which is attacked and sought to be quashed in this application. The rule for that purpose was granted in Michaelmas Term last, and was answered during last term.

It is evident, we think, the chief ground of complaint made against the proceedings of the trustees, is that they have expended more money upon the schoolhouse than some of the ratepayers thought need have been done, and now the complainant falls back upon the ground that the act of the trustees in raising money by means of the loan from the clergy reserve fund to build the schoolhouse, without the sanction of the ratepayers of the section, was illegal, and contrary to the provisions of the school act.

The 30th section of ch. 64, of the Consolidated Acts of U. C., enacts that no steps shall be taken by the trustees for procuring a school site on which to erect a schoolhouse, or changing the site, without calling a special meeting to consider the matter. That was complied with in 1857, and the site settled.

By section 34 the township council is authorised to levy by assessment upon the rateable property in the school section for the erection of a schoolhouse, such sum or sums as may be required by the trustees in accordance with the desire of the majority of the freeholders and householders, expressed at a public meeting called for that purpose, as authorised by the 27th section of the act, sub-section 10.

Now when we turn to sub-section 10 of section 27, we find the provision to be, that for the purpose of providing salaries of teachers and all other expenses of the school, it may be done in such manner as may be desired by the majority of the freeholders and householders of such section, at the annual school meeting, or at a special meeting called for the purpose.

We need not discuss the point whether the mode of raising the amount necessary to erect the schoolhouse could be done at the annual meeting without first giving notice that it would be brought up at such meeting. The 34th section seems to contemplate that a meeting must be called for the purpose, and I have no doubt, if notice has been properly

given before-hand, then the annual meeting might be looked upon as a meeting for that purpose, as well as for the ordinary business to be transacted at such meeting. But I can see room for argument that notice of such a matter as providing funds for the erection of the schoolhouse should be given before the annual meeting takes place, so as to constitute it one for that purpose as well, or that a special meeting should be called for the purpose, because without such notice before the annual meeting the freeholders and householders may not suppose that any other business than the election of trustees and the ordinary business will be then transacted. The procuring of a site for a schoolhouse, or change of one, is treated as something more than ordinary. The 34th section is wider in extent, embraces more matters than mentioned in sub-section 10 of section 27, and does not use the expression as in the other, that a majority of the freeholders and householders may express a desire for the purposes under the 34th section *at the annual meeting*, but it is at a meeting called for the purposes mentioned in the section; and therefore it would seem to be something more than the ordinary business which would take place at the annual meeting which was contemplated. The 10th sub-section mentioned speaks of salaries of teachers and all other expenses of the school, no mention being made of providing the means of erecting the schoolhouse.

Be that however as it may, in this case it is not shewn that the subject matter of raising funds to build this school house was taken up or discussed, or submitted to the annual meeting held in January, 1859, and it is not pretended that any meeting was called for that purpose anterior to the arrangement the trustees made with the council of the township to borrow money from the clergy reserve fund, and give the debentures of the corporation of school trustees for the money, and the resolution of the council to that effect of the 15th of October, 1859. In pursuing the course the trustees did it is quite clear they were not conforming to the provisions of the school act. They were depriving the freeholders and householders of any voice in the matter.

The school house has been finished and occupied, and a



great many of the ratepayers now make affidavits, stating they are perfectly satisfied with what has been done by the trustees; and as it would now throw every thing into confusion to quash this by-law, we must see what has been done since the 15th of October, 1859, and what part the complainant took in such proceedings, in order to discover whether any thing has occurred which would disqualify him from now complaining.

Mr. Wheeler, the reeve of the township, in his affidavit states that at the annual meeting in January, 1860, he presided as chairman: that it was explained to the meeting with what funds the schoolhouse was to be built: that the contract with the builder was read, and the plans shewn: that "Mr. Taber was present at this meeting, and took an active part in discussing the several questions before it. And the said complainant did not then object to any thing connected with said building, which had been done by the trustees, or which was contemplated by them to be done, neither was any objection offered by any other person, but the meeting seemed to be to deponent, as he verily believed at the time, unanimous for building the said schoolhouse in the manner proposed by the said trustees.

Some five other persons, ratepayers of the section, who were present at the meeting in 1860, confirm the statement of the reeve. There are no less than 26 of the ratepayers of the section who swear that they are satisfied with what has been done. And further, it is shewn that at the meeting held last January, since one of the debentures has been redeemed with the money levied last year, and the same appearing in the account of the trustees for the year, the report of the trustees was sanctioned and confirmed. It is said that this last meeting was the largest that has been held in the section, and that only the complainant and some two or three of his friends found fault with the item of paying that debenture by means of the assessment.

In reply to the acquiescence and consent stated in the different affidavits of the proceedings which took place at the meeting of January, 1860, the complainant has filed the affidavits of himself and another person, stating that the com-

plainant did strongly protest that the mode adopted by the trustees for raising the money was illegal, and that they had no right to do it, as they did, without the sanction of the majority of the ratepayers at a meeting to be called for that purpose.

It is impossible for us to dispose of the matter satisfactorily to ourselves upon such contradictions as presented in the affidavits, and we have no mode of ascertaining which of them be the true statement, and therefore we must draw inferences from other matters which are not in dispute. For instance, this complaint is not made until after the schoolhouse has been finished, and the complainant with other ratepayers has been called upon to pay his proportion. He well knew at the meeting in January, 1860, of the mode proposed to build the schoolhouse, and it was then in his power to have stopped proceedings by applying to quash the resolution of the council of the 15th of October, 1859, but he waited until that was followed up by a by-law to levy a rate to pay the first of the debentures granted by the trustees. He must have well known that such a course to redeem the debt must be resorted to, and yet he does nothing, even giving credit to what he says, but protest that they were not acting rightly, because no public meeting was convened for the purpose.

There appears to be nothing illegal upon the face of the by-law, and the question therefore is whether the court is bound to quash a by-law for an irregularity in the proceedings made out by extraneous evidence. This court has already held that it is not compulsory upon it to quash a by-law thus attacked. See *Standley and The Municipality of Vespra and Sunnidale*, (17 U. C. R. 69.) *Ianson and The Corporation of Reach*, (19 U. C. R. 591.)

We think the rule should be discharged.

Rule discharged.

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## BELLHOUSE V. GUNN.

*Interpleader—Costs.*

Two interpleader actions having been twice tried, resulted in favour of the plaintiff, the claimant of the goods in question, and on application to the judge who granted the orders to dispose of the costs, the matter was referred to full court. *Held*, that the plaintiff was entitled as of right to the costs of the actions: that the costs incurred before the issues, in procuring the order, &c., should also be paid by defendant; but the question raised as to the discretion of the court in such cases being a new one, each party was ordered to pay his own costs of the application.

On the applications of the sheriffs of Lincoln and Wentworth, two interpleader issues were directed to try whether two certain locomotives belonged to Gunn, the execution debtor, or to Messrs. Burton & Sadlier, claimants of them. These orders had been made by the Chief Justice of this court. The issues were tried at Hamilton, at the fall assizes, in 1859, in one of which the jury not agreeing were discharged, and in the other the jury found a verdict in favour of Messrs. Burton & Sadlier. The court upon application set the verdict aside, and ordered a new trial. Both issues came on again for trial at the spring assizes, 1860, and in both verdicts were rendered in favour of Messrs. Burton & Sadlier. Applications were again made for a new trial, which rules were ultimately discharged.—See *Burton v. Bellhouse*, 20 U. C. R. 60.

The Chief Justice, who made the interpleader orders, was applied to for the purpose of disposing of the costs of the issues and different proceedings under the orders, but entertaining some doubts as to the proper order to make, and whether it was discretionary with the judge to make such order as to him seemed to be right according to the facts of the case as proved at the two trials, he referred the parties to the court.

Accordingly in Hilary Term last *Jackson* obtained a rule *nisi* calling upon the plaintiff, Bellhouse, and each of the sheriffs to shew cause why Messrs. Burton & Sadlier should not have their costs of the issue, and otherwise attendant thereon, and of the various proceedings.

During this term *MacLennan* shewed cause, citing *Rex v. The Lord of the Manor of Oundle*, 1 A. & E. 299; *Rex*.



v. Round, 4 A. & E. 139; Rex v. Commissioners of the Thames and Isis Navigation, 5 A. & E. 817; Regina v. The Justices of Surrey, 9 Q. B. 37; Tapping on Mandamus, 416; Regina v. Mayor of Lichfield, 6 Jur. 624; Consol. Stats. U. C., ch. 30.

*Eccles*, Q. C., supported the rule, citing *Lewis v. Holding*, 2 M. & Gr. 875; *Melville v. Smark*, 3 M. & Gr. 57; *Bowen v. Bramidge*, 2 Dowl. 213; *Janes v. Whitbread*, 11 C. B. 419; *Regina v. Kelsey*, 20 L. J. Q. B. 283; *Dempsey v. Caspar*, 1 P. R. 134.

McLEAN, J.—By the 9th section of chapter 30, Consolidated Statutes of Upper Canada, it is declared, (as in 7 Vic., ch. 30, sec. 6,) that the costs of all such proceedings, that is the costs of all proceedings authorised by the preceding sections, shall be in the discretion of the court or judge. Then the question is in what manner that discretion must be exercised in the present case. The whole property claimed has been decided to belong to the plaintiff in the interpleader cases, and therefore there is no occasion for exercise of the same discretion as in the case of *Lewis v. Holding*, (2 M. & Gr. 875,) where the court gave neither party the general costs of the issue, nor the costs of the rule, but gave to each such portion of the costs as applied to the part on which he had succeeded, and allowed the claimant his costs of the application under the Interpleader Act.

In the case of *Melville v. Smark*, (3 M. & Gr. 57,) the court decided that the claimants of goods taken in execution having failed upon an issue directed to try the validity of the claim under the Interpleader Act, the proper course was to require them to pay the costs of the application and of the subsequent proceedings, and *Tindal*, C. J., in delivering judgment, said, "In cases of interpleader, the Court of Chancery always requires the unsuccessful party to pay the costs. The same course has been adopted in practice in the courts of common law, acting under the late statutes. I see no reason for pursuing a different course when claimants happen to be assignees of a bankrupt." In the case of *Janes v. Whitbread*, (11 C. B. 419,) the verdict in an interpleader

case being unsatisfactory, a new trial was granted on payment of costs. *Maule, J.*, said "The verdict was unquestionably against the evidence. I see nothing to take the case out of the general rule as to costs, which applies as well to trials of interpleader issues as to any other cases."

The execution creditor, the plaintiff in the suit against Gunn, having caused property to be seized which has been decided by several juries to be the property of Burton & Sadlier, the claimants, and they having been compelled to proceed by the interpleader suits to establish their right to such property, and being successful in that object, are entitled to all costs to which they have been put in obtaining the interpleader orders, and all subsequent costs in the suits instituted under the orders. But Bellhouse having been brought into court on this occasion by a summons issued at the instance of Messrs. Burton & Sadlier, relating to the costs, and the question being a new one as to the discretion of the court or a judge with reference to costs, and how such discretion is properly to be exercised, I think the rule must be made absolute, but without costs on either side, on this application, each party paying their own costs.

BURNS, J.—The costs of these cases must now be very considerable, and a matter of some importance, and may, as *Tindal, C. J.*, said in *Lewis v. Holding*, (2 M. & Gr. 875,) be divided into three descriptions—costs incurred before the issues were ordered, and attendant upon the exercise of the sheriff's duty upon the *fi. fa.*, costs of the trial of the issues and consequent thereon, and costs of the subsequent applications.

The question is whether the power of the court or a judge, under the provisions of the Interpleader Act, ch. 30, of the Consolidated Acts of Upper Canada, is or not discretionary over all these costs. With respect to the costs of the interpleader rule there can be no question, but a question has been made as respects the costs of the issues and attendant thereon. Messrs. Burton & Sadlier, as plaintiffs in the issues, claim to be allowed those costs on the general principle of law that the successful party is entitled to be paid his

taxable costs as in any ordinary case, and that these being interpleader issues makes no difference; while, on the other hand, Bellhouse contends the court or a judge is invested with power to grant or withhold those costs according as the facts or circumstances of each case may call for.

In the case I have already mentioned, of *Lewis v. Holding*, Chief Justice *Tindal* said he could not consider an interpleader issue as in the nature of an action of trover, in which by the strict rule of law, founded upon the Statute of Gloucester, the plaintiff is entitled as of right to the costs of the cause if he succeeds as to any part of it, and he thought the court had a more extended jurisdiction under the Interpleader Act than under the Statute of Gloucester. He further makes this observation, "It seems to me that we are entrusted with a discretion as to costs, in the exercise of which we ought to be mainly guided by the decision of the jury." It must be observed that the court was there dealing with a case in which the jury had found that part of the property belonged to the plaintiff and part of it to the defendant. The direction the court gave was that the master should tax the bills of both sides and then set off the one against the other. In the case before us there can be no division as to the costs of the issues, the plaintiffs in the interpleader issues having succeeded must get the costs or not at all.

In *Janes v. Whitbread*, (11 C. B. 406,) in disposing of the costs upon granting the new trial in that case the court said, "We feel some difficulty as to the costs," and *Jervis*, C. J., speaking of the discretionary authority of the court, said that he apprehended that power applied to the costs of the interpleader rule only. Mr. Justice *Maule*, who had tried the case, stated that the verdict was unquestionably against the evidence, but he saw nothing to take the case out of the general rule as to costs, which applies as well to interpleader issues as to any other cases; and the court ordered the new trial only on payment of costs.

In *Bowen v. Bramidge* (2 Dowl. 213,) the court of exchequer laid down the rule in an interpleader issue that the party who succeeds is entitled to the costs of the action, and the party who fails must pay them.



In the present case Messrs. Burton & Sadlier succeeded, and there is nothing to deprive them of the rule thus stated in *Bowen v. Bramidge*, unless the court has the power of discretion over the costs of the action as well as the other costs. I have not been able to find any authority supporting such a proposition. I do not think the case of *Lewis v. Holding*, upholds any such view. The verdict was a divided one. Each party was right to a certain extent, and the court only did what would have been done had there been two issues instead of one; for in the former each successful party would have recovered costs against the other, and the one judgment for costs might in such case have been set off against the other, but the whole matter being disposed of by the one issue, the court applied the principle which would have been allowed in the other case. Therefore, instead of that case being an authority for saying that a discretion is given over the costs of the issues irrespective of the finding of the jury, I think it supports the general proposition that costs of the issue are awarded to the successful party.

The interpleader act was made in relief of sheriffs, and the consequence is when a claimant is brought before the court he is deprived of his action against the sheriff, and he is made to join issue with the execution creditor with respect to his claim upon the property. Now, although he may, notwithstanding the interpleader, perhaps bring his action against the execution creditor in some cases, where the creditor is active in setting the sheriff in motion, yet he is deprived of any remedy against the sheriff. I can hardly imagine the legislature intended that the claimant should be subject to be deprived of his costs of the action which he is compelled to engage in for the relief of the sheriff. It is enough to deprive him of any remedy against the sheriff, without also giving the court a discretion to deprive him of costs of an action he must go on with, and if he does not must pay costs. To hold otherwise, would I think, be holding that the interpleader act by implication has repealed the Statute of Gloucester in such cases as the present.

I am therefore of opinion that the costs of the issues and trial, with the costs consequent thereupon, of right should be

paid by Bellhouse to Messrs. Burton & Sadlier: that the cost incurred before the issues ordered—that is of the interpleader summons and consequent upon the sheriff discharging his duty with respect to the property—should be paid by Bellhouse; and the costs incurred by the parties since in procuring the summons and order in chambers as to the costs, and the costs of this application, should be divided between the parties—that is, each side paying his and their own costs.

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### SAULTER V. CARRUTHERS.

#### *Award—Compulsory reference—Setting aside.*

The rules as to setting aside awards are unchanged by the Common Law Procedure Act, and are the same with respect to compulsory references as to others.

The court therefore refused in this case to interfere on affidavits tending to shew that the arbitrator was mistaken as to the law and fact.

After the service of the writ upon the defendant in this case, which was specially endorsed, the plaintiff applied in chambers to have the matter referred to an arbitrator. The Chief Justice of this court on the 22nd of January, 1861, made an order referring the action, and all matters in dispute, both at law and in equity, to the late W. A. Campbell, Esq. After taking a great deal of evidence, Mr. Campbell made his award on the 17th of April, 1861. Proceedings were stayed upon it to give the defendant an opportunity to move to set it aside.

*Magrath* during last term obtained a rule from the Practice Court, returnable in this court, to shew cause why the award should not be set aside. The rule was a very long one, but the objections taken were in substance these:—that the arbitrator exceeded his authority; that the award was bad, unjust, erroneous, and the amount found due the plaintiff was excessive; that the arbitrator acted partially, and with gross ignorance of the law of evidence, and of the law as applied to the facts of the case. Various affidavits were filed, and attached thereto was the original evidence taken down by Mr. Campbell.

*Bell* shewed cause, and filed affidavits in reply, one of which was made by Mr. Campbell.

BURNS, J., delivered the judgment of the court.

We have very carefully read all the affidavits on both sides, and also the whole of the evidence as taken by Mr. Campbell. The latter we did with a view of ascertaining whether the charges made in the rule against the arbitrator had any foundation, because the argument in this cause for introducing all the various grounds stated in the rule is based upon the fact that this was a compulsory reference, and therefore it should be open to a party to complain of an award, under such circumstances, in as full and ample a manner as he could do in applying to the court for relief against a verdict.

We find the contest between the parties chiefly was whether the plaintiff was a partner with the defendant in certain contracts for constructing drains and paving the streets of Toronto. The arbitrator thought he was such partner, and found that there was due from the defendant to the plaintiff £334 16s. 1d., which he ordered defendant to pay.

We do not find any ground for saying that the arbitrator exceeded his authority. By the order referring the matters to him, he was clothed with authority to investigate and decide upon all matters in dispute, both legal and equitable. The costs of the reference and award were placed at his disposal, and by the award he has disposed of them. We can discover no ground for imputing partiality, and we must say that upon the merits of the question of partnership between the plaintiff and the defendant, though it is quite unnecessary to express any opinion about it, we are rather disposed to think the arbitrator was right, and if so, then the defendant was rightly charged with a portion of the money paid by the corporation of Toronto to the defendant, for rescinding the contracts in respect of the drains.

But irrespective of the merits of the case, either upon the question of partnership or of the amount which should prove to be due upon taking the accounts, we think it is clearly a



case not coming within our jurisdiction. The case of *Hodgkinson v. Fernie*, (3 C. B. N. S. 189,) is an important case upon the point, for that shews that the effect of the new provisions, with respect to the power given to the court to refer a case back to the arbitrator, has not altered the law which governed the courts in dealing with awards, where are brought in question matters of law or fact, with a view to set them aside, save the few upon which courts have acted. As observed by *Cockburn*, C. J., the defendant might, if he desired to have any question of law submitted to the court, have called upon the arbitrator to state a special case in his award for the opinion of the court, or the order referring the matter to the arbitrator might have provided for it being obligatory on the arbitrator to do so. The 162nd section of the Common Law Procedure Act of the Consolidated Acts is similar to the English act.

The only question remaining is whether there is to be any different rule with respect to awards made under a compulsory reference, as this was, from those made under a reference by consent. In *Hodge v. Burgess*, (3 H. & N. 293,) the Court of Exchequer has decided that under a compulsory reference there is no difference. The point taken against the award in that case was, just as in this, that the arbitrator had decided the matter referred to him contrary to law and fact. The 163rd and 164th sections of our Common Law Procedure Act, of the Consolidated Acts, are precisely like the 7th and 8th sections of the English act of 1854. As *Martin*, B., observed, "It is true that arbitrators may commit error, but we must contrast the one evil with the other, and the evil of having innumerable applications to set aside awards would far exceed the evil of an occasional wrong decision."

The rule must be discharged with costs.

Rule discharged.

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## BRADLEY AND ROWE V. TERRY.

*Ejectment—Several plaintiffs—Proof of title.*

In ejectment where there are several plaintiffs claiming each an undivided interest, it is not necessary that they should prove a joint title, or any privity between them, but they may maintain a joint action upon separate titles.

This was an action of ejectment for lot 20, in the 7th concession of Alnwick. The plaintiffs claimed by several titles, each an undivided one-half. The defendant claimed under a deed from Robert Drope, the patentee, and upon the evidence, which it is immaterial to report, the jury found for the plaintiffs, upon the ground that that conveyance was fraudulent. At the trial it was objected that the plaintiffs could not maintain a joint action, as they claimed under several titles; and that, if entitled to recover, each must bring an action for his undivided half.

Leave was reserved to move for a nonsuit upon this ground, and *Eccles*, Q. C., obtained a rule *nisi* accordingly, or for a new trial upon the evidence, and upon affidavits.

*C. S. Patterson* shewed cause, citing *Coltman v. Brown*, 16 U. C. R. 133.

*McLEAN, J.*—*Mr. Eccles* contended that the plaintiffs could not maintain a joint action on separate titles, though they hold each an undivided interest in the land. No doubt either of the plaintiffs could bring an action for his individual undivided portion, but that could only have the effect of removing the defendant from an undivided half, and letting the one suing come in with the defendant into possession; but the object being to remove the defendant from the premises, if the plaintiffs shew together an interest which covers the whole land, I cannot see why they should not join in an action which will enable them to recover the whole instead of each being obliged to have recourse to a several action, a recovery in which by each would only have the effect of placing them in the position of tenants in common on the premises.

As to the title under which the defendant claims from

Drope, there was certainly very strong evidence to shew that it was fraudulent, and given for the purpose of delaying the creditors of Drope. The dealing of the defendant and Drope with the lands after the execution of the deed, and their statements and declarations to some of the witnesses who were examined on the trial, were such as to satisfy the jury that defendant's title was fraudulent when given, and that the sole object of it was to defeat and defraud creditors.

The affidavits of defendant and Drope do not materially change the aspect of the case, and even if they did the defendant cannot be a witness in his own behalf, should a new trial be granted.

I think the jury came to a correct conclusion on the evidence, and that the verdict should not be set aside, especially as the defendant may, if he thinks proper, bring another action; and bring forward any other testimony which he may be able to produce in support of the validity and honesty of his own title. The rule must be discharged.

BURNS, J.—With respect to the point raised at *nisi prius*, and reserved as ground of nonsuit, namely, that plaintiffs in ejectment should, as in cases of assumpsit, debt, &c., prove some joint title, or connected with each other in some way, as joint tenants or tenants in common, &c.,—it is the first time I have heard such a point raised. In the old form of ejectment the declaration contained several demises whenever it became necessary to rely upon different chains of title, and it is contended that the effect of the alteration of the form of the action of ejectment is to alter the law, and render it necessary that plaintiffs should have a joint interest. However, a little reflection upon the words of the act of parliament must dissipate that idea. The form of the writ given in the ejectment act is this, “to the possession whereof A., B., and C., some or one of them, claim to be,” &c., and the writ in this action is so framed. The 21st section enacts that “the question at the trial shall be whether the statement in the writ of the title of the claimants is true or false, and if true, then which of the claimants is entitled, and whether to the whole or part,” &c.



Proof of a sufficient title in any one or more of the claimants will support the action, either for the whole or for part of the property, according to the evidence. Doe dem. Rowlandson v. Wainwright, (5 A. & E. 520.) See Cole on Ejectment, 285, 286.

I have examined the evidence given at the trial, and upon that the question was whether the deed under which the defendant claimed from the grantee of the Crown was or not fraudulent as against creditors, being made, as contended, without consideration. The jury so found, and I think the evidence justified that finding. The affidavits do nothing more on the part of the defendant than state that he thinks if he had a new trial he would be better able to shew by some old scraps of accounts, which he says was his mode of keeping accounts, for he kept no books, that the person who conveyed him the land was indebted to him at the time of the conveyance. That person was examined as a witness at the trial as to the state of the accounts. If the defendant thinks he can make out a good title and sustain his deed, he may bring another ejectment and thus test it, but I think this rule should be discharged.

Rule discharged.

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### FOLWELL V. HYDE AND CASLOR.

*Joint and several promissory note—Arbitration as to one maker—Pleading.*

In an action against the makers of a joint and several note payable to R. or bearer, one defendant allowed judgment to go by default, and the other pleaded, that after the note fell due, and while it was in R's hands, certain disputes arose between R. and this defendant, respecting this note among other matters, which were submitted to arbitration: that the arbitrators awarded that the defendant should pay R. a sum named, and that he and R. should execute mutual releases; and that the plaintiff took the note after it fell due, with notice of these facts. At the trial the submission and award were proved, and that the plaintiff was present at the arbitration: that the note was disallowed to R., because this defendant, being a surety only for the other maker, had been discharged by giving time; and that the plaintiff then stated that he had no claim upon the note.

*Held*, that the note being several, the plea was good, though the action was against two defendants, and the award related to one only; that it was unnecessary to aver performance of the award; and that defendant was entitled to a verdict.

The plaintiff commenced this suit against the defendants by a writ of summons against them jointly, on the 9th day

of March, 1861, endorsed according to the Common Law Procedure Act of 1856, setting forth the particulars of the plaintiff's claim, £112 19s., being the balance due on a promissory note for £243 3s., dated the 13th of December, 1855, made by the defendants jointly and severally, with interest.

The defendant Hyde, as appeared on the record, did not appear to the said writ, and judgment had been signed against him; and the plaintiff declared against the other defendant, Hiram Caslor, who had appeared to the said writ, for that he, the said Hiram Caslor, and the said John C. Hyde, on the 13th of December, 1855, by their joint and several promissory note now overdue, promised to pay to Christopher Row, or bearer, £243 3s., currency, with interest, and the plaintiff afterwards became the bearer thereof, but the defendant did not pay a large sum, parcel of the said money, to wit the sum of £122 19s., and the interest accruing due on the said sum of £243 3s., from the 13th of December, 1858, to the 11th day of March, 1859, and on the said sum of £122 19s., from the said 11th day of March, 1859.

And for money payable by the defendant to the plaintiff on an account stated between them, and the plaintiff claimed £250.

The defendant Hiram Caslor, for a plea to the first count, said that the promissory note in the declaration mentioned was made by defendants, payable to Christopher Row, in the declaration mentioned, or bearer, and was delivered to the said Christopher Row, who then became and was the lawful holder thereof: that after the said note became due the said Christopher Row was the lawful holder thereof, and before the commencement of this suit certain differences respecting certain moneys alleged by the said Christopher Row to be due to him, the said Christopher Row, from the said Hiram Caslor, and respecting certain claims made by the said Christopher Row against the said Hiram Caslor, and respecting certain moneys alleged by him, the said Hiram Caslor, to be due to him, the said Hiram Caslor, from the said Christopher Row, and respecting certain

claims made by the said Hiram Caslor against the said Christopher Row, and were then depending between the said Christopher Row and the said Hiram Caslor, and among other matters respecting the said promissory note, and they then mutually submitted themselves to refer and did then refer the said matters in difference to the award, order and arbitrament of Henry Rutledge, James Anderson, and William Harris, and agreed that the decision of the said arbitrators should be final, so as the said award should be made in writing under their hands and seals, or the hands and seals of any two of them, ready to be delivered to the parties, or such as should desire the same, on or before the first day of March then next : that afterwards, on the day and year last aforesaid, in consideration that the said Hiram Caslor had then promised the said Christopher Row to perform and fulfil the said award in all things to be contained therein on the part of the said defendant to be performed and fulfilled, he, the said Christopher Row, then promised the defendant and agreed to perform and fulfil the said award in all things to be contained therein on his part to be performed : that the said Henry Rutledge, James Anderson, and William Harris having respectively taken upon themselves the burden of the said arbitration, and having duly considered the subject matters in difference between the said Hiram Caslor and the said Christopher Row, among which was the said promissory note, the said James Anderson and William Harris, two of the said arbitrators, did then make and publish their award in writing, under their hands and seals, of and concerning the premises, ready to be delivered to the said parties, and did thereby award and order, among other things, that the said Hiram Caslor should pay to the said Christopher Row the sum of \$65 20c., and also should pay the sum of \$32 in full satisfaction of all costs, charges and expenses incurred in consequence of the said arbitration ; and that the said Hiram Caslor and Christopher Row should deliver each to the other mutual and general releases of all actions, cause and causes of action, suits, contentions, claims and demands whatever, for or by reason of any matter, cause or thing up to the date of the said submission : that



after the said promissory note became due, and after the said submission to arbitration, and after the making of the said award, the said Christopher Row delivered the said promissory note over to the plaintiff, who took the same with notice of the premises.

To the second count the defendant Hiram Caslor pleaded never indebted as alleged. The plaintiff took issue on these pleas, and the case was tried before Mr. Justice *Richards*, at Barrie.

On the trial, the bond of submission between Christopher Row and the defendant Caslor, dated the 30th of January, 1861, in a penalty of \$4,000, was produced, conditioned that if the said Christopher Row should well and truly submit to the decision and award of Henry Rutledge, James Anderson, and William Harris, of the village of Streetsville, parties named, selected and chosen arbitrators, as well by and on the part and behalf of the said Christopher Row as of the said Hiram Caslor, to arbitrate, award, order, judge and determine of and concerning all and all manner of actions, causes of action, suits, controversies, claims and demands whatsoever now pending, existing or held by and between the said parties, providing the said award be made in writing under the hands and seals of the said Henry Rutledge, James Anderson, and William Harris, or any two of them, and ready to be delivered to the said parties, or such of them as should desire the same, on or before the first day of March next ensuing, then the said obligation to be void, otherwise to be and remain in full force and virtue; and the said Christopher Row thereby consented and agreed that judgment in the Court of Queen's Bench should be rendered upon the award, to the end that all matters in controversy between the said parties might be finally concluded.

One of the arbitrators who made the award was examined as a witness, and declared that Row claimed the balance due on the note to be allowed to him: that the note was not produced at the time to the arbitrators, being then in the hands of a Mr. Todd at Brampton, who wished to use it as a means of making defendant vote in a particular way in

the selection of a county town. Folwell at the same time produced a copy of the note which he had taken, and declared that he had no claim on the original note: that he had nothing to do with it. Row afterwards got the note and produced it to the arbitrators, but the amount was not allowed to him by the arbitrators, because the defendant Caslor was only a surety for Hyde, and time had been given at various periods, and the payment extended to Hyde by Row on consideration of payment of interest.

Upon the evidence the learned judge told the jury that if at the time of the submission and award the note was the property of Row, the award of the arbitrators, which had also been put in evidence, was conclusive, and that defendant, having got the note since with notice, took it subject to the equities under which Row held it.

*M. C. Cameron* objected that the plea must aver performance of the award, and that as the note was for a joint and several debt, it did not come within the submission. The learned judge reserved leave to the plaintiff to move to enter a verdict for him for £142 17s. 6d., if the court should be of opinion that he was entitled to recover, the court to draw any inferences the same as a jury. A verdict was rendered for the defendant.

*Beaty* obtained a rule calling on the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff for the sum of £142 17s. 6d., pursuant to leave reserved at the trial, on the ground that the said note was not arbitrated upon, and could not have been, as alleged in the plea in this cause, because the submission was between the said defendant Caslor and one Christopher Row alone, and the note was a joint note of the defendants; and that an award between different parties other than those to this suit could not be set up herein as an answer to this action; that performance of the award was not shewn, and that the plea did not answer the whole of the action. Or why judgment *non obstante veredicto* should not be entered for the plaintiff, on the ground that the plea confessed the plaintiff's action and did not aver performance

of the award, and on the ground that the plea did not answer the whole declaration, an amount being admitted to be due.

*McMichael* shewed cause, and cited *Melville v. Carpenter*, 11 U. C. R. 133.

*Beaty* supported the rule, citing *Allen v. Milner*, 2 Cr. & J. 47; *Watson on Arb.* 252, 259; *Bullen & Leake Prec.* 289.

**McLEAN, J.**—The objections to the verdict urged in the plaintiff's rule, and the application to enter a verdict for the plaintiff *non obstante veredicto* appear to me not tenable.

The note being a several note, the payee or holder had a right to look to and bring an action against either of the makers, and he might have brought a several action against each at the same time; and though he could sue them jointly and make both answerable in the same action, neither of the several actions would be a bar to the other, and two distinct judgments might be obtained for the same specific amount, on the same identical note. That shews that as to each of the makers the debt was an individual debt, with respect to which each was at liberty to make the best arrangement he could. If *Caslor*, the defendant, had been sued alone by *Row* before the award, he would have a right to refer the suit to arbitration, and an award in his favour would be conclusive as between him and *Row*. Why then should he not be equally at liberty to refer the subject matter of that suit to arbitration before action brought? The fact of another person being liable also for the same amount could not debar him, or deprive him of the right of submitting to arbitration a debt existing against him for which he was liable to be sued jointly or severally. The defendant *Caslor* did what he had a right to do with respect to the note which the plaintiff now claims to recover against him as the bearer and payee. That the submission embraces that note as a cause of action there can be no doubt, because at the arbitration *Row* urged on the arbitrators his right to recover the balance due, and the plaintiff then admitted that he had no claim whatever on the note, and appeared to be desirous that the award should be made in favour of *Row* for the amount. The arbitrators however did not allow in favour of *Row* any but a



small amount of the claim brought forward by him. By their award, bearing date the 26th of February, 1861, they awarded that Caslor should pay to Row the sum of \$65.20 as damages, and the sum of \$32 in full satisfaction of all the costs, charges and expenses incurred by or in consequence of the said arbitration. And then they awarded that Row and defendant Caslor should within twenty days from the date of their award seal and execute to each other mutual and general releases of all actions, cause and causes of action, suits, controversies, claims and demands whatsoever, for or by reason of any matter, cause or thing, up to the date of the said bond of arbitration.

That award puts an end to the right of Row as the holder of the note on which this action is brought ever to sue Caslor upon it, but does not and cannot interfere with the right to recover against Hyde, whose personal responsibility is admitted by his not entering any appearance in this suit. Caslor does not in his plea confess any right in Row or in this plaintiff to sue him on the note. He merely alleges that while Row held the note there were various differences existing between them, one of which was this note: that they entered into bonds, and agreed to refer and did refer these differences to certain persons as arbitrators: that these persons did arbitrate on the matters in dispute, and made their award; and he states what that award was, and that after the making of the said award the then holder of the note, who had entered into the arbitration respecting it, transferred and delivered the said note to the plaintiff, Folwell, who had full knowledge and notice of the premises. That is a good answer to this action, for though Row at the time he delivered the note to the plaintiff could recover the amount awarded in an action on the award, he could not himself sue or give a right to another by the mere delivery of the note to recover in an action on that note the balance remaining unpaid on it. Whatever Caslor owed to Row could only after the making of the award be recovered in an action on that instrument, and he could not invest the plaintiff with any power to sue on the note when he could not do so himself.

The plaintiff's counsel contend that the plaintiff has a right to recover because a sum is shewn to be due on an award, and performance of the award is not averred. The performance or non-performance of the award to Row, who alone is entitled to demand the money payable by Caslor, cannot affect the plaintiff's right in this action, or the defendants' liability. If the plaintiff on receiving the note from Row after the award had gone to Caslor, and demanded the amount awarded as still payable on the note, and Caslor had paid that amount to the plaintiff, I apprehend that such payment could be no bar to an action on the award at the suit of Row against Caslor. The delivery of the note to the plaintiff would give him a right to recover any balance due against Hyde, but the plaintiff taking it with notice that Row, the former holder, had arbitrated with Caslor respecting it, and that the claim on the note against Caslor had resolved itself into the shape of an award which Row alone could enforce, must be barred from recovering as against him on the note.

The case of *Gascoyne v. Edwards*, (1 Y. & J. 19,) shews that arbitrament without performance of the award is a good plea where the parties have mutual remedies, and I think there can be no doubt that the parties to the award have mutual remedies on their respective bonds of submission. The plaintiff of course can derive no advantage from the reference. If the award were not a bar to his recovery, then he would be entitled to recover the whole sum of £142 17s. 6d., though the arbitrators have found that the defendant Caslor should pay \$65 and the costs of the reference. It appears to me quite clear that this rule must be discharged with costs.

BURNS, J.—With respect to the objection raised by the plaintiff that the plea is bad, because the submission and award shewn is that of one defendant alone, whereas the action is against two defendants on the note sued on, we must bear in mind the note is several as well as joint, and under these circumstances each of the parties might refer his indebtedness or liability on the note to arbitration without joining the other.

With respect to the necessity of averring performance of the award in the plea in order to bar the action on the note, the plaintiff relies chiefly on the case of *Allen v. Milner*, (2 Cr. & J. 49.) There the court said we must look at the pleadings and how the question arises. In the case cited a special demurrer was put in to the plea, and Lord Lyndhurst, in holding that the plea was no bar to the action, drew a distinction between that case and *Gascoyne v. Edwards*, (1 Y. & J. 19,) on the ground that the one was to recover one demand, and it appeared by the plea that the reference was to ascertain the debt due upon it, being a money demand, whereas in the other the action was upon a covenant to recover damages, and that in the case of *Allen v. Milner* the award did not extinguish the cause of action, but only ascertained the amount due. The pleas in both cases averred a mutual submission, and mutual promises to perform the award. I think the distinction a very refined one, and if I were compelled to say which case, supposing there was a conflict between them, had the most authority to support it, I should say that of *Gascoyne v. Edwards* had. The case of *Gascoyne v. Edwards* was also before the court on demurrer, but it was a general demurrer. The present case comes before us on the validity of the plea after verdict on it in the defendant's favour. The declaration only claims a balance to be due on the note, and to that balance the defendant Caslor pleaded that he and the holder of the note, Row, and to whom it was made payable, had not only referred the matter respecting the note, but various other matters in dispute to arbitration. One of the arbitrators proved the bond of submission containing the obligation to perform the award, and he also proved that the note in question was disallowed by them *in toto* as a demand against the defendant Caslor, and the ground of its being disallowed, shewing that the sum awarded must have been upon the other matters referred. Taking those facts to be established, it is manifest that the performance of the award cannot be a condition which it is necessary to aver to make the plea of the award good, for if so the plaintiff must then concede that the award had found



the amount due as well upon the demand on the note as of the other matters referred, a point against him in some respects as to enforcing payment of the amount of the whole note. We see by the evidence the plea was proved in all respects, and we cannot say after verdict upon it, the plaintiff taking issue instead of demurring, that it affords no defence.

Looking at the case with respect to the pleadings, it is more like *Gascoyne v. Edwards* than *Allen v. Milner*, and considering that the plaintiff instead of demurring chose to deny the truth of it, and it has been adjudged against him, the case differs from them both. Every intendment will be made to support a verdict which accords with the merits of the case.

I think the rule should be discharged.

Rule discharged.

## THE QUEEN V. THE MUNICIPAL CORPORATION OF THE COUNTY OF HALDIMAND.

*Mandamus to repair bridge—Indictment—Practice.*

A *mandamus nisi* having issued commanding a municipal corporation to repair and rebuild a bridge, it appeared on the return that the liability was disputed on several grounds, it being contended that the bridge did not belong to defendants: that it was not constructed on the site provided by the charter of the original company which built it, and was in an unfit and dangerous place; and that it should be repaired by another municipality.

*Held*, that under these circumstances a *mandamus* would not lie, and that the applicants must proceed by indictment; and *semble*, that the latter is the proper remedy in all cases, except where a charter has been obtained to construct the road, and the work has never been done.

*Eccles*, Q. C., during last term obtained a *mandamus nisi*, of which the following is a copy.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Municipal Corporation of the County of Haldimand, greeting.

Whereas we have been given to understand in our court before us, that by a certain act of parliament passed on the twentieth day of April, in the year of our Lord one thousand

eight hundred and thirty-six, certain persons were incorporated under the style and title of "The Cayuga Bridge Company," and authorised and empowered to build and construct a bridge over and across the Grand River at Cayuga, in the said county of Haldimand, for the use and benefit of the public generally :

That pursuant to the terms and provisions of the said act of parliament the said bridge was built and constructed at the place and for the purpose aforesaid, and was used and enjoyed by the public generally :

That on or about the fifth day of August, in the year of our Lord one thousand eight hundred and forty-two, William Kingsmill, Esquire, sheriff of the then district of Niagara, (within which the said bridge was situate,) under and by virtue of certain writs of execution to him directed, sold the said bridge to one William Fitch, and by a certain deed poll conveyed the same to him, and thereby the title to the said bridge became vested in him, the said William Fitch :

That by a certain indenture made between the said William Fitch, of the one part, and the said municipal corporation of the county of Haldimand, of the other part, and dated on the seventeenth day of October, in the year of our Lord one thousand eight hundred and fifty-one, the said William Fitch duly conveyed unto the said municipal corporation all his right, property, title, interest and demand of, in and to the said bridge, and thereby the same became vested in the said corporation :

That the said municipal corporation have from the time of the said conveyance to them as aforesaid until the happening of the accident hereinafter mentioned, repaired and maintained the said bridge, and used and suffered the public generally to use and enjoy the same as a common and public highway :

That some time in or about the month of March now last past, the said bridge became and was greatly damaged and injured, and parts thereof were carried away by the freshets of said river, and thereby became useless and impassable, and by reason thereof the public generally have been deprived of the use and benefit thereof, and of the means of

crossing said river at the place aforesaid, as they had been accustomed to do :

That application has been made to the said municipal corporation to cause the said bridge to be repaired and in part rebuilt, but they have neglected and refused to do so, and have declared their intention of abandoning the same, and of allowing it to remain in its present dilapidated state, to the great inconvenience, damage and injury of the public in general, and of the inhabitants of the village of Cayuga in particular, as we have been informed from the complaint of Joseph Harssell, Esquire, reeve of the said village of Cayuga, and a ratepayer within the said county of Haldimand.

Whereupon he hath humbly besought us that a fit and speedy remedy may be applied in this respect, and we being willing that due and speedy justice should be done in this behalf as it is reasonable, *We therefore command you*, the said municipal corporation of the county of Haldimand, firmly enjoining you, that immediately after the receipt of this our writ you do properly repair and in part rebuild the said bridge, and keep the same repaired and maintained, so that the public generally may use and enjoy the same as a common and public highway for crossing the said river at the said place, or that you do shew us cause to the contrary thereof, lest on your default the same complaint should be repeated to us, and how you shall have executed this writ make appear to us at Toronto, on Friday, the thirty-first day of May instant, at twelve o'clock, noon, then returning to us this our said writ.

Witness the Honourable Sir John Beverley Robinson, Baronet, Chief Justice of our said court, at Toronto, this twentieth day of May, in the year of our Lord one thousand eight hundred and sixty-one, and in the twenty-fourth year of our reign.

By the court,

(Signed) CHAS. C. SMALL.

Issued from the office of the Clerk of the Crown, Toronto,

(Signed) CHAS. C. SMALL.



Affidavits were filed verifying the statements contained in the writ.

The return, supported by affidavits, set out that the bridge was built originally not on the line of the Canboro and Simcoe road mentioned in the statute 6 W. IV., ch. 10, but deviated therefrom about 300 feet northerly: that the sale under execution in 1842, was upon a *fi. fa.* against goods and chattels, and not against lands: that the bridge was wholly within the limit of the village of Cayuga; and lastly, that the site selected originally, and upon which the bridge was built, was not suitable, but the original one mentioned in the charter, that is, the continuation of the Canboro and Simcoe Road, would be preferable.

*Adam Wilson*, Q. C., shewed cause. 1. The sheriff could not sell the interest of the company in this bridge. They could not do it themselves, it would have been a dissolution of the company, and the sheriff therefore could not do it for them. All that he could possibly sell would be the tolls, for which the assistance of the Court of Chancery would probably be required, but he could not dispose of the bridge. The public have an interest in it as part of the highway, and it cannot be sold. (*Burns*, J., referred to *Scott v. The Trustees of Union School Section No. 1*, in *Burgess*, and *No. 2*, in *Bathurst*, 19 U. C. R. 28, where it was held that land conveyed to the trustees for the purposes of a school house could not be sold under an execution.) *Grant on Corporations* 306. In *Arnold v. Ridge*, 13 C. B. 760, it is said, quoting from *Dyer* 7 *b*,—"A man can never have a thing extended on an execution, unless he may grant and assign it." In *Legg v. Evans*, 6 M. & W. 36, and the *Governors of St. Thomas's Hospital v. The Charing Cross R. W. Co.*, 7 Jur. N. S. 256, this seems to be taken for granted. *Furness v. The Caterham R. W. Co.*, 4 Jur. N. S. 1213, S. C. 27 Beav. 358; *Fenwick v. Laycock*, 2 Q. B. 108; *Regina v. South Wales R. W. Co.* 14 Q. B. 902. These cases shew that the original bridge company could not have sold their bridge, and if so at common law the sheriff could not.

If the act, *Consol. Stats. U. C. ch. 49*, secs. 68, 69, 70, authorises a sale by the sheriff, then he must make a valid

sale, and here it should have been under a writ against lands not goods, for the bridge is not chattels but realty, being part of the highway.

There is another objection fatal to this application. The 6 W. IV., ch. 10, requires that this bridge shall be built on the main Canboro and Simcoe road, and the affidavits shew that it never was built there, but on an entirely different road. They had no authority to construct the bridge where they did, and the court therefore cannot compel us to put a bridge where there is no right to place it. In the *Mayor of Norwich v. The Norfolk R. W. Co.*, 4 E. & B. 397, it is held expressly that erecting a bridge out of the authorised line was an act *ultra vires*, and all contracts relating to it were void. If it is 300 feet out of the way, as here, it is the same in effect as 300 miles.

Again it is within the Municipality of the Village of Cayuga, and the county has no jurisdiction there. Consol. Stats. U. C., ch. 54, secs. 336, 339. Sec. 342, subsec. 7, shews that they may obtain aid from the county to build the bridge, but that is a very different thing from making the county build it themselves.

Another reason urged to the discretion of the court is, that if the bridge really were on the line of road, the place is shewn to be unsafe and improper for the purpose.

As to whether a mandamus is the proper remedy in such a case, there are authorities on both sides of the question. *Regina v. The Bristol Dock Co.*, 2 Q. B. 64; *The King v. The Severn and Wye R. W. Co.*, 2 B. & Al. 646. As to the obligation on a company to complete their work when partly performed, see *York and North Midland R. W. Co. v. The Queen*, 1 E. & B. 860.

We contend therefore that the writ should not go—1. Because the county has no jurisdiction. 2. Because the road has never passed properly from the original company, which therefore still exists. 3. Because the original site is not that on which the bridge has been constructed, and we cannot be compelled to put it in the wrong place. 4. Because it is shewn to be an improper and dangerous site for the purpose.

*Eccles*, Q. C., *J. R. Martin* with him, contra. As to the sale having been made under a *fi. fa.* against goods, that appears only by recital in the sheriff's deed. It is not proved otherwise or sworn to here, and the recital, which may be wrong, cannot bind us. Moreover, if the sale was so made, there is nothing to shew that this bridge was not in fact goods; it may have been, and if so the presumption is that it was, for otherwise the sheriff should not have sold it under the writ. But under the statute referred to, Consol. Stats. U. C., ch. 49, sec. 70, it is clear that the sale being made under legal process is valid.

As to both these objections, however, it does not lie in the mouth of the county now to say that they have no title. They have assumed the bridge, they have repaired it, they have leased it, and have taken the tolls; and they cannot now say that they never owned it, and were wrong in doing all these acts.

Then it is alleged that the act (6 W. IV., ch. 10) requires the bridge to be on the Canboro and Simcoe road. The statutes recites that it would be very convenient to have it on that road; it is not said that it must be there. The deviation of 300 feet is not material, and at all events there the bridge was when the county assumed it, and they assumed it in that locality. If there were no act to authorise the bridge at all, still they assumed it as a county bridge, and having done so they must continue to repair and maintain it, and cannot escape their liability.

As to the argument that the village only has jurisdiction and the county none, there was no incorporated village there when they assumed the road. It became then the property of the county, and having done so it never vested in the village. The corporation of Cayuga have never assumed it by by-law or otherwise. Consol. Stats. U. C. ch. 54, secs. 315, 316, 339. Under sec. 337 the county were authorised to assume the bridge, which they did. The village never got it, and never could, for the county would not give it up so long as they could collect tolls from it. Under secs. 339 and 340 the county might build a new bridge and then give it up by



by-law, but now at all events until that is done they must repair.

As to the remedy by mandamus in this case, in the *Justices of Huron v. The Huron District Council*, 5 U. C. R. 574, the writ was refused to compel the council to build a court-house, but the judgment shews that in a case like this it would have been granted. In the *Municipality of Augusta and the Municipal Council of Leeds and Grenville*, the writ was ordered to compel the council to make a road, which is a case clearly in point.

But without any statute there is no reason why the common law of England should not prevail here, and if it does there is abundance of authority to shew that the counties are, with very few exceptions, bound to repair bridges. *Rex v. The Inhabitants of the West Riding of Yorkshire*, 5 Burr. 2594; S. C. 2 W. Bl. 685; *Regina v. West Riding of Yorkshire*, 2 East 342; *Ib.* 356, note; *Rex v. The Inhabitants of Kent*, 2 M. & S. 513, shew this. *Rex v. The Inhabitants of Northampton*, 2 M. & S. 262; *Rex v. The Inhabitants of Devon*, R. & M. 144, shew that any bridge over a stream running between banks is a public bridge, *James v. Green*, 6 T. R. 231; *Rex v. Inhabitants of Kingsmoor*, 2 B. & C. 194. It is a common law liability, and applies notwithstanding the trustees of the bridge are authorised to raise tolls. The county are bound to repair, because it is for the public benefit, unless it is clearly shewn that the obligation is cast upon some one else, as, for instance, a company authorised to build a bridge and compelled to repair and maintain it; but as there is nothing in the act of incorporation obliging the Cayuga Bridge Company to repair, even if the title remained in the county, as is contended, they would still be bound to repair.

BURNS, J.—The cases are not altogether satisfactory upon the point of jurisdiction to grant the writ of mandamus to repair a road, but I think the weight of authority and precedents are against it, for the proceeding seems to be rather by way of indictment. The distinction seems to be that where certain parties have undertaken the construction of a

road, and have obtained a charter for the purpose, which is assumed to be a contract between such parties and the public that the road or work will be constructed, and the work has not been done, then the court will interfere by mandamus as the proper remedy, upon proper case made and no sufficient excuse shewn. This court acted upon that principle in the case of the Municipality of the Township of Augusta v. The Municipal Council of the United Counties of Leeds and Grenville, (12 U. C. R. 522.) That principle was established in England by the cases of Regina v. The Birmingham and Gloucester R.W. Co., (2 Q. B. 47, 1 G. & D. 337,) and other cases. But where the application is for the repair of a road already constructed it may be doubted whether the proper remedy is not by indictment. In the case of The Queen v. The Trustees of the Oxford and Witney Turnpike Roads, (12 A. & E. 427,) Lord Denman said, "I know no instance of a mandamus to repair a road." The case of Rex v. The Commissioners of Llandilo Roads, (2 T. R. 232,) which is cited as an authority upon this point, does not contradict his lordship's assertion, for the rule for it was discharged, but the case has been cited by most writers as in support of the application for mandamus. Whether his lordship, in giving the judgment of the court, when he said, "If we entertained applications for writs of mandamus in such cases, we might have to try questions of guilty or not guilty on the state of the roads, and all questions affecting the liability," meant this to be of universal application, I cannot say, or whether he intended it to apply only in the particular case, where it was a dispute between two bodies upon whom the duty lay of repairing part of a street in the city of Oxford. Since that decision I have found no instance of a mandamus being asked for to repair a road, but, on the contrary, the proceeding has been by way of indictment generally, though on one occasion the Court of Queen's Bench granted an information for the non-repair of a road, because two persons, inhabitants of the parish liable to repair the road, happened to be upon the grand jury at the assizes, and through their influence the bill of indictment had been thrown out. See The Queen v. The Inhabitants of St.

Leonards, (10 Q. B. 827.) The case of *The Queen v. The Inhabitants of Bedfordshire*, (4 E. & B. 535,) was an indictment for not repairing a bridge.

The first question in dispute between the two corporations is upon which of them rests the liability to repair the bridge. The village of Cayuga contends that the title to the bridge is vested in the county now by the purchase of it, but the county contends it has no legal title to the bridge, and the village answers that again by alleging that, though possibly that may be true, yet the county has hitherto since the purchase exercised ownership over it, and has also from time to time repaired it and exacted tolls for the use of it. Then again, the county contends that under the section of the Municipal Act, ch. 54 of the Con. Acts U. C., the bridge being wholly within the village of Cayuga, the duty is cast upon the village to repair it, for under those provisions the bridge belongs to the village, and that the jurisdiction which the county has hitherto exercised over it is a usurped one. Besides all this, the county contends the bridge never was constructed in the place intended when the charter was granted to the Cayuga Bridge Company; and besides that it is contended the site is not a proper one to have been selected originally, and the county would, if the onus be cast upon them to repair, desire to move the site to another part of the river. The village opposes that, because if removed it would not be in accordance with the streets of the town approaching the bridge.

These conflicting interests seem to be the very matters contemplated by Lord Denman, and render it proper that the rights of the parties should be settled by indictment, or some other mode than by mandamus.

The village of Cayuga in adopting this remedy did so avowedly upon the ground of being more speedy in its application than that of indictment, and as they have chosen to try an experiment I think the applicants must pay the costs.

The mandamus *nisi* should therefore be quashed with costs.

*McLean, J.*, concurred.

Mandamus *nisi* quashed.



## IN THE MATTER OF HAGAMAN AND CHISHOLM, AND THE CORPORATION OF THE TOWN OF OWEN SOUND.

*By-law—Harbor—Wharves—Tolls.*

A municipal corporation by by-law authorised individuals to erect wharves, and to remunerate themselves by charging tolls on goods, part of which were directed to be paid to the treasurer of the municipality. The harbor master was empowered to detain any vessel having on board any goods on which these tolls were unpaid, or any such goods; and a fine of not less than \$1 nor more than \$50, was imposed on any master or owner of a vessel refusing to comply with these conditions, to be enforced by distress and sale.

*Held*, that the by-law was illegal; but see 24 Vic., ch. 63, since passed.

*Bell* obtained a rule *nisi* to quash by-law No. 58 of the corporation of the town of Owen Sound, or the second and third sections thereof, on the ground that the said by-law was illegal, the said corporation having no authority to pass such a by-law; and that the said by-law was bad for uncertainty; and further, because the said by-law assumed to fix tolls upon goods and property shipped from Owen Sound, contrary to law; and it did not define for what purpose the said tolls or dues were to be so levied; and also because the said corporation assumed the right to collect the said tolls in a manner not warranted by law.

The by-law, passed on the 31st of October, 1860, was entitled "A substitute for by-law No. 57, to repeal by-law No. 50 of the town of Owen Sound, with respect to harbor dues, and to make more effectual provision for the protection of public wharves, and to regulate the harbor and prevent the filling up of the same, and for erecting and maintaining beacons, and erecting and renting wharves, &c., and paying a harbor master."

It recited that it was expedient for the commercial interests of the town of Owen Sound that a beacon light should be erected and maintained for the protection of vessels, crafts, or rafts entering the harbor of Owen Sound, and that parties desirous of erecting wharves on the river Sydenham should have the privilege of so doing under certain conditions, and of extending the same along the said river, and across the streets abutting thereon; and that provision should be made for the appointing and payment of a har-

bor master; and that it was necessary that all vessels, crafts, or rafts arriving in the harbor of Owen Sound, should be subject to and under the control of the harbor master: that a beacon light should be maintained; and that all wharves that might thereafter be erected in the town of Owen Sound should be constructed on a uniform plan.

And it enacted as follows:—1. That it shall be lawful for the harbor master to direct the landing, lading, or discharging of any vessel, craft, or raft entering the harbor of Owen Sound; to erect a beacon or beacons; and to furnish the necessary oil and other material for lighting the same, and the beacon now erected.

2. That any person or persons may erect a wharf or wharves in front of his or their premises, (such premises being situated on the river Sydenham,) with the consent of the council of the town of Owen Sound first had and obtained, and may extend the same across any adjoining street, provided such wharf or wharves be constructed in the manner hereinafter mentioned, and also provided that all persons shall have access to the waters.

3. That any wharf that now is or shall hereafter be erected on the river Sydenham, along or across any public street, shall be leased by the municipality for a period of one year, or such other term as may be agreed on, to the person or persons who shall have erected the same, in consideration of the annual rent of ten cents per foot frontage, to be paid to the treasurer of the municipality in half-yearly equal payments in advance, and to be applied to the general purposes of the harbor of the town, and such person or persons, or any other person in occupancy of such wharf or wharves, in consideration thereof shall charge, collect, and receive on all goods, chattels, wares and merchandise landed upon or passing over said wharf, such rates of wharfage as are hereinafter named, or such other rates as may from time to time hereafter be fixed by by-law of this council, two parts thereof to be paid over to the harbor master on demand for the use of the town, and the other part to be retained by the lessee of the wharf. (Then followed a schedule of rates to be charged upon the different goods.) All

articles not therein enumerated to be charged at the rate of forty cents per ton.

4. That any or all wharf or wharves that may be erected shall be built under the direction of the council of the town, and that the lane and the approach thereto shall at all times be kept in good repair, condition and order; and that in default of being so kept the said council may interfere and regulate the same in such manner as shall seem to them expedient and requisite, at the cost of the lessee or persons in occupancy.

5. That no person shall receive or discharge from any vessel, craft, or raft any article thereinbefore enumerated, or any article not enumerated, but chargeable as unenumerated, on or from either bank of the river Sydenham, without permission of the harbor master, and without first paying to the harbor master for this municipality the rate of charges hereinbefore imposed, or that may hereafter be imposed, as wharfage, by by-law of the corporation of the town of Owen Sound; nor shall any person or persons using either bank of the river, with leave as aforesaid, make any breach therein, cut, destroy, or damage, or in any way alter, the present slope of the said banks, under penalty of not less than \$1 or more than \$50 over and above costs.

6. That the harbor master shall have power, and is hereby authorised to regulate all vessels, crafts, or rafts entering the harbor, and during the time they remain in the harbor they shall be under his control, and the masters or other person in charge shall obey his orders with respect to them, and the harbor master shall also have power and is hereby authorised to detain any vessel, craft, or raft which may have on board any article on which dues imposed by this by-law are unpaid, until the same are satisfied, and the harbor master, or any lessee or person in occupancy of a wharf, shall have power, and is hereby authorised to detain any such articles which may be landed until the rates thereon are paid.

7. That the harbor master shall pay over moneys received by him to the town treasurer weekly.

8. That the owner, master, or other person in charge of



any vessel, craft, or raft, refusing to comply with any of the provisions of this by-law, shall, upon conviction thereof before the mayor, police or other magistrate of the town, be subject to a fine of not less than \$1 and not more than \$50, to be paid forthwith, exclusive of costs; and in default of payment of the fine and costs, the same may be levied by distress and sale of the goods and chattels of the vessel, craft or raft, or of the offender; provided always, that the fine hereinbefore mentioned shall be no bar to the recovery of damages by the corporation in any court of competent jurisdiction for any injury done to any bridge, bank, or wharf in the town of Owen Sound.

9. That John C. Spragg be harbor master of the town of Owen Sound, and his salary as such be seven cents in the dollar on the amounts received by him, and that he shall have the full power of directing all vessels, crafts, or rafts while in this harbor, and of imposing and collecting all wharfage dues and other rates imposed under this by-law.

10. That John Mills be lighthouse-keeper, and that his salary as such be \$20 for this season, to be paid out of the moneys collected under this by-law.

*Creasor* shewed cause, contending that the corporation under the second and third sub-sections of sec. 294, Consol. Stats. U. C., ch. 54, had authority to pass the by-law.

*Bell* supported the rule.

McLEAN, J., delivered the judgment of the court.

By the sub-sections referred to by Mr. *Creasor*, the corporation of any city, town, or incorporated village, have power to pass by-laws for making, opening, preserving, altering, improving, and maintaining public wharves, docks, slips, shores, bays, harbours, rivers or waters, or the banks thereof; for regulating harbours, for preventing the filling up or encumbering thereof, for erecting and maintaining the necessary beacons, and for erecting and renting wharves, piers, and docks therein, and also floating elevators, derricks, cranes, and other machinery suitable for loading, discharging, or repairing vessels; for regulating the vessels, crafts, and

rafts arriving in any harbour, and for imposing and collecting such reasonable harbour dues thereon as may serve to keep the harbour in good order, and to pay a harbour master.

Now though the corporation have authority under the fourth sub-section to make by-laws for erecting and renting wharves, piers, and docks at their own costs for the public benefit, they have no power to authorise individuals to erect wharves, and to remunerate themselves by imposing tolls on produce and other property of specific amount, and at the same time to require that a portion of the toll so imposed shall be paid into the town treasury for the benefit of the town; and then the extraordinary power given for and the manner of collecting such tolls are wholly unauthorised by any provisions of law. The power of imposing and collecting such reasonable harbour dues as may serve to keep the harbour in good order is confined to vessels, crafts and rafts arriving in any harbour, and certainly cannot be extended by any by-law of the corporation to the produce and goods to be shipped from the harbour.

The by-law is clearly illegal in these provisions, inasmuch as there was at the time no authority to impose tolls on goods for the objects which the corporation had in view. But the legislature during the last session have relieved that body from any difficulty in that respect by authorising them to impose and collect certain tolls. Chap. 63 of the acts of last session is in force from the 18th of May last. All the sections of by-law 58 must however be quashed with costs, except the 9th and 10th, because they all relate to the carrying out and enforcing the provisions of that by-law, except those sections which appoint a harbour master and light-house keeper. A further or other by-law will be required under the act referred to, and then no doubt all the powers which the act confers will be judiciously embodied in the same by-law.

Rule absolute.

IN THE MATTER OF THE JUDGE OF THE COUNTY COURT OF  
ELGIN.

*Refusal of judge to act—Application for mandamus—Interest of judge and relationship to parties.*

A garnishee summons having issued in a county court suit, one H. opposed it as assignee of the judgment debtor, and in answer to his claim an affidavit was filed from which it would appear that the judge was interested with H. in his claim. He then declined to act further in the matter, and after several subsequent meetings signed a memorandum, stating as an additional reason for refusing to proceed the fact that H. was his brother-in-law.

The court under these circumstances refused a mandamus to compel the judge to dispose of the case.

In Hilary Term last *Richards*, Q. C., obtained a rule *nisi* calling upon Mr. Hughes, as judge of the county court of the county of Elgin, to shew cause why a writ of mandamus should not issue commanding him to grant a summons as such judge to one John Allworth, in a suit in the said court wherein Allworth was plaintiff and one Wegg and others defendants, and one Patrick Burke was garnishee, and to proceed upon and dispose of the application according to the 289th and following sections of the Common Law Procedure Act.

During this term *John Wilson*, Q. C., shewed cause.

The facts of the case are fully stated in the judgments.

McLEAN, J.—On this application affidavits have been filed with a view to inform the court of the precise state of the proceedings, and the cause of staying such proceedings in the county court of the county of Elgin, and it is not difficult to perceive that much of the difficulty which has occurred has arisen from the terms on which the parties are with each other, and which it is much to be feared manifest themselves even in the ordinary proceedings of the court.

In this case an order was applied for to attach a debt due by one Patrick Burke to one Asa Howard, to answer on a debt recovered by John Allworth against Asa Howard and two other parties. The usual attaching order was granted and served on Burke, the garnishee, and a summons calling on the garnishee to appear and shew cause why he should not pay over that debt, or so much as was necessary to



satisfy the debt recovered by Allworth against Asa Howard and others. At the time appointed Burke, the garnishee, appeared before the judge of the county court in chambers, pursuant to the summons. He admitted that there was a debt of a certain amount to be paid by him to Asa Howard, but alleged that it was only payable by instalments, for payment of which the time had not arrived. At the same time Mr. Edward Horton appeared before the judge, and claimed a right to be heard for the purpose of shewing that the debt could not be attached at the instance of Allworth, or any other execution creditor, on the ground that it had been assigned to him, Horton, by Howard, before the order to attach had been issued or served. The right of Mr. Horton to appear for such purpose was objected to by Mr. Abbott, attorney for Allworth, and by Mr. Stanton, who had several attaching orders for the purpose of attaching part of the same money in the hands of Burke.

The consideration of the application was postponed to give time to consider as to the objections urged to Mr. Horton having a right to be heard, and before the time appointed for proceeding with the hearing the objection was abandoned by Messrs. Abbott and Stanton; and then Mr. Horton produced an affidavit shewing that he had sold some lots of a property known as the Thompson farm to Howard; that Howard then agreed to hand him over the note of \$500 which he held against Burke, of which Horton as his attorney was to collect \$200 to pay himself for the lots, and the balance to be applied in some other suit in Horton's hands for collection: that relying on this arrangement made before Howard absconded, he, Horton, had procured conveyances to be made to one Thompson, to whom Howard was indebted, at the request of Howard, the purchaser of the lots, and that such arrangement appeared in Howard's hand-writing entered in a book in his own possession, but found amongst his papers by his wife after he had absconded.

Mr. Abbott then, in reply to Mr. Horton's claim and affidavit, filed an affidavit of his own stating that Asa Howard absconded from Canada some months previously: that a short time ago, and long after Howard absconded, Edward Horton, Esq.,

who claimed a portion of the money due by the garnishee, Burke, to Howard, and who has made an affidavit in the matter, told him, Abbott, that he did not hold any assignment of any portion of the moneys owing from the said Burke to the said Howard; that he, Abbott, was informed and believed that the Thompson farm mentioned in the affidavit of the said Edward Horton, including the two town lots therein stated to have been sold by the said Edward Horton to the said Howard, was on the 21st day of March last the property of the said Edward Horton, Edward M. Yarwood, William K. Kains, and David John Hughes, Esquire: that they were then, and had been for a long time, and still were the parties beneficially interested therein, and that he had good reason to believe that the name Horton & Co., in the memorandum referred to in the said affidavit of the said Edward Horton, meant the persons mentioned in the foregoing paragraph.

On that affidavit being read the judge objected to his name being made use of and mixed up in the matter, and asked Mr. Abbott whether he meant that he was interested in the application which Horton was making to prevent the order being made for paying over the money to Burke, and Mr. Abbott replied that he had made the affidavit to contradict the affidavit of Mr. Horton. Mr. Hughes then stated that if it was intended to be alleged that he was interested in the matter he could not proceed any further with it: that if he was interested he ought not to proceed with it, and if he was not that affidavit should be withdrawn; and he told Mr. Abbott to enquire from his brother-in-law Mr. Kains: that he knew every thing about the purchase of the Thompson farm, and could give every information on the subject; and that he would adjourn the further hearing of the summons till he, Abbott, should have time to enquire on the subject of the Thompson farm, and ascertain as to the alleged interest of the parties therein.

The consideration of the application was further adjourned, and Mr. Abbott then offered another affidavit similar in all respects to the other, except that the name of Mr. Hughes was omitted, and the words "and another" inserted in its

place. The judge was requested to proceed on that affidavit, but declined doing so, alleging that he could not proceed so long as the charge of interest remained directly or indirectly, and he handed back the papers which had been laid before him in support of or against the summons at the instance of Allworth. Subsequently an application was made to the judge to allow another barrister to dispose of the matter, but Mr. Ellis, who was then acting for Mr. Horton, would not consent to that course. Finding that they could not proceed to get an order for their clients to have the money in Burke's hands paid on the judgments recovered against Howard, Mr. Abbott and Mr. Stanton again applied to Mr. Hughes to proceed in adjudicating on the several summonses which were pending before him, and, as Mr. Hughes says, they did so in a menacing manner, stating that Mr. Hughes' compliance *would save more troublesome proceedings*, while they allege that no threat of any kind was used by either of them, and that all that either of them did was to request Mr. Hughes to re-consider the proceedings.

Mr. Hughes then told the parties he could proceed no further under the circumstances, and he drew out or dictated a statement to the clerk of Mr. Abbott or Mr. Stanton referring to matters of a personal nature, and the unhappy difference existing between them; and then for the first time, as far as can be seen from the papers, objected to proceed on account of Mr. Edward Horton being connected with him by marriage, and Mr. Horton being personally interested in the result. In closing this paper Mr. Hughes makes a statement amounting to a species of irritating reply, which I think a sense of his own position ought to have prevented his making: "Having said this much I am now prepared to await the result of the troublesome proceedings with which the parties *yesterday thought proper to alarm me*, and which *I have no doubt, indeed I have too much reason to feel, have not been forborne or spared on my account*, or from any apprehension that they might be troublesome to me."

There are various other statements and accusations contained in the affidavit of the judge to compel whose action in a portion of his judicial duty a mandamus in this case has



been applied for, and whatever may be the bitterness of feeling or the hostility existing towards him on the part of the practitioners making the application, there is too much reason to fear that there is not a better or more kindly disposition entertained towards them by him. But while I must regret the existence of such evident hostility between gentlemen whose professional duties must bring them very often together, and while I cannot but think that a proper and conciliatory spirit on either side would long since or might certainly long since have led to the removal of the obstacles which have caused a stay of proceedings undoubtedly injurious to the parties interested, it is necessary without further delay to decide whether on the affidavits before us a mandamus can properly be issued to compel the performance of those acts of duty which the parties desire to have performed by the judge of their county.

I am not surprised that upon the reading of Mr. Abbott's affidavit, stating who the parties were in whom the title of the Thompson farm was vested on a particular day, the judge should make the enquiry whether it was intended to impute to him an interest in the subject matter of Mr. Horton's claim to the money payable by Burke to Howard for certain lots of that farm sold by Horton to Howard, and afterwards conveyed by the proprietors to one Thompson to discharge a debt of Howard. The terms of that affidavit are such that it is difficult to imagine what other object could have been intended by it. The disavowal of that object, while Mr. Abbott declined to withdraw that portion of it, which, as it appears to me, was useless to his case, could scarcely remove the impression that such must have been its original intention, and while that continued to be the case I cannot say that the judge acted improperly in forbearing to act in a matter in which a charge of personal interest might even seem to be fastened upon him. The title to the Thompson farm might be vested in him as one of four proprietors, and yet he might not be interested in the proceeds arising from the sale by the managing owner of two small lots worth only £50 together. If the parties were desirous to get the money they had in view for their clients on the attaching

order they might surely have abandoned such an affidavit, but the pertinacity in adhering to it would seem to indicate an intention to compel the judge to abstain from adjudicating on the question on which their right to the money depended, or to compel him, if he did so adjudicate, to submit to the charge of acting in his judicial capacity in a matter in which his personal interest was concerned.

Then as to the ground assigned at so very late a period, that a brother-in-law was personally interested in the result, and therefore Mr. Hughes could not further entertain the applications pending before him, that must certainly be a sufficient reason for declining to act as a judge. Where any degree of relationship exists between a judge and a party personally interested in the litigation, the law and ordinary propriety will prevent the judge from acting judicially between the litigating parties, and had the reason been assigned in proper season, even those who desired to proceed with a view to have an order for the payment of money could not but have admitted its sufficiency, and would have proceeded by some other means to obtain their end.

As the matter now stands, I think it would be wrong to issue a mandamus to compel the judge on this occasion to proceed in a matter which a judge of one of the superior courts most certainly would not feel at liberty to entertain under the same circumstances. The parties may apply and remove their suits into one of the superior courts, and have the summons for the payment of the money by the garnishee to the persons claiming it on their executions decided by some judge not personally interested in the amount, and not connected with any one that is.

I think that the rule must be discharged with costs, because long before the application for mandamus was made the parties were aware that one of the reasons for declining to proceed was the near connexion of the judge with one of the parties interested in the questions to be decided on.

BURNS, J.—The purport of the affidavits upon which the rule was granted is as follows: on the 1st of September,

1860, an attaching order was made in the suit of Allworth v. Wegg et al., attaching a debt said to be due by Patrick Burke to one of the defendants in the cause, and by summons to Burke he was called on to shew cause why he should not pay the debt, or a sufficient sum to pay Allworth's judgment. On the 8th of September, Burke appeared at the return of the summons, and admitted the debt. At the same time Mr. Edward Horton, an attorney, appeared before the judge on behalf of other parties who claimed a right to the debt so attached in preference to Allworth. The matter was adjourned. On the 17th of November the parties appeared again before the judge, and then Mr. Ellis, another attorney, appeared on behalf of Mr. Horton, and the Bank of the County of Elgin, Mr. Horton then claiming the amount due from Burke as assignee of the judgment debtor—the latter having absconded. The matter was again adjourned till the 24th of November, and then Mr. Abbott, the attorney for Allworth, produced an affidavit to answer Mr. Horton's affidavit, and among other things contained in it was a passage explaining how the judgment debtor became indebted to Mr. Horton; it being stated in Horton's affidavit that the judgment debtor had bought two town lots on the Thompson farm, to pay for which the judgment debtor had assigned to him, Mr. Horton, the debt owing by Burke. Mr. Abbott stated in his affidavit that he was informed and believed that the Thompson farm mentioned was on the 21st of March, 1860, the property of said Edward Horton, E. M. Yarwood, W. K. Kains, and Mr. Hughes, (the judge.) The judge, Mr. Hughes, declined to receive the affidavit on the ground of his name being mentioned in it, and the matter was then adjourned to the 4th of December. Mr. Abbott then proposed to put in and use another affidavit, which stated that the Thompson farm was the property of "Horton, Yarwood, Kains, and another," but the judge declined to receive that also, and dismissed the parties, and marked the summons thus, "I decline to act further in this matter," and signed the same. Ineffectual attempts were made to induce Mr. Hughes to take up the consideration of the matter, and he finally made a memorandum with respect to it in these words :



“January 30th, 1861.—In the absence of the other parties, Mr. Stanton and Mr. Abbott applied this day for a reconsideration of my declining to act further in the matter of these summonses, *in order to save more troublesome proceedings*. I stated I would hear what they had to say on the subject to-morrow, when the other parties are present.

“January 31st, 1861.—Mr. Abbott and Mr. Warren appeared for the several plaintiffs, and Mr. Ellis for the Bank of the County of Elgin and Mr. Edward Horton. Mr. Abbott suggested that if I would appoint some other barrister to dispose of the cases they would be able to proceed, but as matters now stand the plaintiffs found it difficult, and were debarred of their remedy. I asked Mr. Ellis if he was willing that some other barrister should act in my stead, which he said he was unwilling to accede to, whereupon I read the following :

“I now definitely decline to interfere further in the consideration of these summonses, first, for the reasons already given by me when I last declined to do so, and because it has been suggested by the attorneys for these plaintiffs that I am personally interested ; and for the following : because, secondly, I find Mr. Edward Horton, who is connected with me by marriage, and whose interest Mr. Stanton and Mr. Abbott have complained that I favour, is personally interested in the result. Thirdly, and lastly, I place the case of *Foot v. Howard*, in which Mr. Stanton is the plaintiff’s attorney, on the same footing as *Allworth v. Howard* and *Lock v. Howard*, because Mr. Stanton placed the management of *Foot v. Howard* in the hands of Mr. Abbott, who placed them all on the same footing when he read the affidavit which suggested my interest in the matter, and Mr. Stanton being present sat by giving suggestions, prompting Mr. Abbott, and no doubt acting in concert in all he said and did ; and it is too much for me to be expected to believe what is alleged now, that he did not so act in concert. He should have foreseen the effect of Mr. Abbott’s course before he allowed himself to be committed to him.

“Having said this much, I am now prepared to await the result of the *troublesome proceedings* with which the parties

yesterday thought proper to attempt to alarm me, and which I have no doubt, indeed I have too much reason to feel, have not been foreborne or spared on my account, or from any apprehension that they might be '*troublesome*' to me.

"The attorneys acting for these plaintiffs voluntarily placed themselves in the present attitude towards myself, and however much it may be a subject of regret, I can only say it has been none of my seeking, and that if these plaintiffs suffer it is by the action of their own attorneys in making improper suggestions; for I cannot allow these gentlemen one day to say that I universally show partiality to another attorney, and allow myself on another day to be called upon to decide a case in which a relative by marriage is interested, and in the result of which they suggest I am myself personally interested, so as to open a door to further complaints in the event of an adverse decision, that I favoured that relation, or attorney, or my own interest. I conceive I have no right to be called upon to decide any case in which I am not free to act with all proper discretion, and to give a decision as law, justice, and right may dictate, regardless of the feelings, opinions, or interest of any one, or in which my motives might be open to question, or my interfering obnoxious to censure.

"If I am wrong in these views the parties have their remedy, but feeling strongly as I do upon the impropriety of my acting otherwise, I must leave these matters as they stood when I before declined to act further in them."

On shewing cause several affidavits were filed.

The facts before stated are not denied or varied, but what took place at the different meetings is given more fully. Mr. Hughes states that it was not the use of his name in the affidavit which was produced at the meeting of the 24th of November that he objected to, nor did he object to Mr. Abbott using the other affidavit omitting his name. He says he asked Mr. Abbott what it was that was intended by the affidavits, and the reply was, that it was only intended to contradict Mr. Horton. The judge then said, "Do you intend to state that I am interested? If you do, I cannot go further in the matter;" or, "Do you think I am inter-

ested?" And to this it is stated that Mr. Abbott would give no decided answer. The judge then further added, "If I am interested, as is suggested by the affidavit, then I have no right to decide this case; if I am not interested, the affidavit should be withdrawn; but with that affidavit before me, implying that I am interested, I will go no further. If you desire it, I will enlarge the summons to give you an opportunity to inform yourself. Your brother-in-law, Mr. Kains, is acquainted with the whole business, and can give you every information." All this is confirmed by the affidavit of Mr. Parke, a solicitor, not having any thing to do with any of the business connected with the suits mentioned, but who happened to be in attendance before the judge on the 24th of November, upon another matter. Mr. Parke adds in his affidavit, that the judge seemed to treat the matter as if the affidavit stated an interest in him, and when the question was put to Mr. Abbott, he neither admitted or denied, nor did he explain what he meant by it; and Mr. Parke says he was under the impression at the time that if Mr. Abbott had disclaimed any desire to impute interest to the judge, or had withdrawn or explained the affidavit, the judge would have gone on with the matter; but it was enlarged that in the meantime Mr. Abbott might satisfy himself with regard to the judge's interest. What took place on the 4th of December the judge says was this: when Mr. Abbott was proceeding to argue the matter, the judge stopped him until the question of the judge's interest was settled, and it was disclaimed that he had any interest; whereupon Mr. Abbott said he had not read his affidavit to shew that the judge had any interest, but to contradict Horton's affidavit, and as the judge did not like his name used he would make use of the other affidavit in which his name was omitted; and to this the judge remarked that it was only dealing with the shadow and not the substance; what was required was a disclaimer of imputing to the judge that he was interested in the matter he was called upon to adjudicate about. Mr. Abbott making no offer, as the judge says, to retract the suggestion that he was interested, he declined to act further, and so endorsed the summons.



The point about the interest of the judge appears to be this from the affidavits: the judge and Mr. Horton, and the other two named gentlemen, joined together in purchase of what is called the Thompson farm, for the purpose of laying it out into village lots and selling them. Mr. Horton had the management of selling the lots and accounting to the others for their different shares of the purchase money. He sold two of the lots on his own account to the judgment debtor, and there were also other accounts between them, and to settle up all the matters between them, and pay for the lots, as Horton contends, the judgment debtor assigned to him the debt due by Burke, the garnishee. The portion of the purchase money of the two lots which would be going to Kains, one of the proprietors, has been settled for with him by Horton, but he has not yet settled with the judge or Mr. Yarwood; and as Mr. Horton states, he will either owe each of them a share, or they will be entitled to take an equal portion of the land, and sell it for their own benefit. Evidently the question ultimately to be decided will be whether the assignment of the debt due from the garnishee to the judgment debtor was made, and whether done legally to vest the right in Horton of calling upon the garnishee to pay him. The judge and Mr. Horton are brothers-in-law.

There are many things in the affidavits on both sides which shew that the members of the profession at St. Thomas are not only not on good terms with each other but are also at variance with the judge. Such feelings never conduce to the ends of justice, but on the contrary often thwart it, and the clients are made the victims in the way of unnecessary delays in the transaction of their business, and their pockets suffer by both unnecessary and very often unjust expenses, incurred in proceedings having no other end to serve than for mere gratification either to pride, envy, or malice. I do not intend to say who are most to blame or who are most in the wrong on this occasion, but it is evident, I think, if the feelings of the parties beyond the mere question in the case itself had not crept into it, there surely ought to have been no difficulty in the disposition of the matter upon the summons. The question was whether Burke should pay Allworth, the

judgment creditor, or pay Horton. As we see it explained, whether Mr. Horton would have to pay the judge a proportion of the purchase money of the two lots, or whether the judge might sell some of the land and pay himself, was not of the slightest consequence. Why, therefore, Mr. Abbott should have inserted in his affidavit any account of the manner in which the title of the property was held it is difficult to perceive, unless his object was to annoy and unnecessarily mix up the judge's name in the matter. He could have obtained information upon the point, if he had thought it necessary that he should have the matter explained. The judge was quite right in putting the question to Mr. Abbott, and insisting upon an answer, as to whether he intended charging him with having an interest in the matter to be disposed of; but then, on the other hand, if the judge had been, perhaps, a little less punctilious, and at once have stated what now appears, and particularly if Mr. Horton had stated in his affidavit what the meaning of the memorandum of Horton & Co. was, and had stated what appears in his affidavit now, that he sold the lots on his own account, we might have been spared the necessity of deciding an unnecessary dispute. Then, again, had Mr. Ellis, who represented Mr. Horton and the bank, accepted the offer made by the other side of withdrawing the consideration of the matter from the judge, and left it to a barrister, the question might have been decided.

The question of the judge's interest being removed out of the way, as it is by the affidavit, a more serious one remains, and that is the relationship existing between the judge and Mr. Horton. The interest of Mr. Horton was not that of an attorney in his client's business, and to which the judge alludes in his memorandum of the 31st of January that he has been accused of favouring by his partiality; but his interest was direct, which was to be determined, that is, whether he had or not a valid assignment of the debt due by Burke. The judge might well be excused from being called on to determine that question if he could avoid it.

The case of *Becquet v. Lempriere* (1 Knapp, P. C. C. 376) throws a great deal of light upon the point. Among the questions brought up on appeal from the Royal Court of

Jersey, one was whether one of the jurats who sat in the court below was incapacitated. He had been objected to on the ground that his first wife was aunt to the respondent, Lempriere. It appeared that the wife had died without children many years before, and that the jurat had married two other wives afterwards, by whom he had had children. The court held him incapacitated according to the law of Jersey.

In the argument of that case, it was mentioned that Mr. Justice Lawrence on one occasion refused to try a case in which one of his relatives was concerned, though he was not incapacitated by law to try it.

The question, therefore, now is, whether we should issue a mandamus to compel Mr. Hughes to proceed in a matter in which his brother-in-law has a direct interest. The writ of mandamus is not a writ grantable of right, but is a prerogative writ, and the absence or want of a specific legal remedy gives the court jurisdiction to dispense it; and if there be a legal remedy, either at common law or by act of parliament, it will be refused.

Now, when we look at the constitution of the county court, we see that the Crown may appoint two persons, one to be the judge of the county court, and the other to be the junior judge. Of course it is provided that both shall reside within the county appointed for, and shall not practise the profession. No doubt the Crown would not desire to incumber the fee fund with the appointment of an additional judge to a county where perhaps the fund will scarcely pay the salary of one judge, but I am not sure this court should be governed by such a consideration of the subject. It so happens that the county of Elgin has but one judge, but if another were appointed all difficulty in the way of the parties proceeding would at once be removed.

Then again, the 8th section of the act, ch. 15, of the Consolidated Acts, U. C., provides for the appointment of a deputy judge for temporary purposes, allowing him to practise his profession in the meantime. The question upon this section is whether such an appointment must necessarily be confined to the case of death, illness, or unavoidable absence, or the



absence on leave of the judge. It may be that it would be held to be so confined, and yet it may be urged that the provision should be construed liberally in favour of justice, and to enable the Crown to appoint so that justice may be done.

Whatever may be thought about either of these courses to be attempted, I feel clear there is another course open to the plaintiff in the suit in the court below, and that is to apply to the superior court for a writ of *certiorari* upon the facts, to remove the record and proceedings to the superior court, in order that justice may be done. Mr. Tidd in his treatise on Practice, (vol. 1, 9th ed., p. 400,) says: "And in cases of absolute necessity, as where the inferior court refuses to award execution, the court above will grant a *certiorari* after judgment, for the sake of doing justice between the parties," and for this he quotes 1 Lil. P. R. 252, 253. In *Arthur v. The Commissioners of Sewers in Yorkshire*, (8 Mod. 331) the court uses this language: "It is true where a man is chosen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior jurisdiction, who proceed in a summary way, in such case he is entitled to a *certiorari ex debito justitiæ*, because he has no other remedy, being bound by the judgment of the inferior judicature."

With regard to Mr. Hughes' reason for not proceeding to adjudicate upon the summons by reason of his relationship to Mr. Horton, we can scarcely be expected to compel him by mandamus to do that which I have shewn a judge in England declined to do, and which has also occurred more than once in this province. Anciently a judge could not try a civil or criminal case in the county in which he was born or inhabited, so jealously guarded was the administration of justice, but that was remedied by statute.

Rule discharged.

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HENDERSON V. THE GRAND TRUNK RAILWAY COMPANY  
OF CANADA.*Horses escaping on Railway—Plaintiff's possession of close.*

The plaintiff owning land adjacent to the railway, permitted one D. a servant of the company living within their fences, to cultivate a small piece free of rent. D. made a gate in the railway fence to give him access to this land, and the plaintiff's horses passed through it to the railway track and were killed.

*Held*, affirming the judgment of the county court, that the plaintiff was sufficiently in possession of the close from which the horses escaped to entitle him to recover.

This was an action in the County Court of the United Counties of Frontenac, Lennox and Addington, to recover damages from the defendants for unlawfully, and negligently, and injuriously omitting and refusing, pursuant to the statute in that behalf, to erect and maintain sufficient fences on each side of their line of railway of the height and strength of an ordinary division fence, by means whereof two mares of the plaintiff lawfully depasturing and being in a certain close of the plaintiff adjoining the said railway of the defendants, strayed from the said close into and upon the said railway, and were there run over and killed by a certain locomotive steam-engine and carriages of the defendants.

The second count was for neglect in erecting and putting up fences on each side of defendants' railway, by reason of which omission and neglect in erecting and maintaining the same according to the statute in that behalf, a horse of the plaintiff depasturing in a certain close of the plaintiff adjoining the said railway of defendants, escaped and strayed from the said close of the plaintiff into and upon the said railway, and was there run over and badly injured by the locomotive steam-engine and carriages of the defendants, whereby the plaintiff lost the use of his said horse for a long time, to wit for the space of two months, and was thereby otherwise greatly damnified.

There were four counts in the declaration, varying the injury complained of, and the defendants pleaded not guilty to the whole declaration; and 2ndly, to each count of the declaration, that the defendants did erect and maintain on each side of their said line of railway fences of the height and strength of an ordinary division fence.

The plaintiff took issue on the several pleas, and the case was tried at the last December sittings of the county court, and a verdict rendered for the plaintiff, and \$165 damages.

On the trial it was proved that the horses were at pasture in a field on the plaintiff's farm, and that from defect of fences they strayed from that field into a small piece of ground belonging to the plaintiff immediately adjoining the railway track, which the plaintiff had permitted one Patrick Daly, a servant of the defendants residing in a small house at the Gananoque railway station, to use free of rent for the purpose of raising a few potatoes and vegetables for his own use. It was proved further that Patrick Daly had opened a small gate in the railway fence for the purpose of passing to and fro from his own house inside the railway fence to the ground adjoining on the outside, which he cultivated with the assent of the plaintiff as a mere matter of indulgence.

It was shewn that the tracks of horses were seen through that gateway from the plaintiff's premises adjoining, and there seems to be no doubt from the evidence that the horses came from the plaintiff's field to that portion of the plaintiff's land worked by Patrick Daly, and then that they strayed from thence through the gate which Daly had made for his own convenience in the railway fence close to his house, and so got on the railway track, and were killed or injured by a locomotive and carriages passing along the line of railway.

The defendants' counsel called no witnesses, but objected to the plaintiff's case, that according to the evidence the horses broke into Daly's garden first, and then escaped from it to the railway, and not from the plaintiff's close as alleged in the declaration. 2. That there was no evidence of the ordinary height of division fences in the township of Leeds. 3. That there was not evidence of the killing; and 4. That there was no evidence to support the second count.

The learned judge overruled these objections, and the case went to the jury with a charge as to the nature of the possession of the ground on the plaintiff's farm from which the horses had strayed or escaped to the railway, to which no



objection was made on either side. He told the jury that if Daly had such a possession as entitled him to hold against the plaintiff for any time, however short, then the plaintiff could not maintain this action: that he must have a right to the exclusive possession, so that the horses must have passed from premises over which he was entitled to exercise entire control, to enable him to sue for injury arising from want or defect of fences on the part of the defendants: that if Daly was merely working the ground as a matter of indulgence, having no right to do so except at the mere will and pleasure of the plaintiff, then the plaintiff must be regarded as still in possession, and entitled to enter at any moment on his land without being liable to any one for damages in doing so. The jury found for the plaintiff after a full explanation of the law as to the necessity of the plaintiff being in possession of the land to entitle him to sue for the damages sought to be recovered in this action.

A rule *nisi* was obtained for a new trial on the grounds previously urged by defendants against the plaintiff's right of action, and from the judgment discharging this rule the defendants appealed.

*Bell* (of Belleville) for the appellants, cited *Walker v. Great Western R. W. Co.*, 8 C. P. 164; *Gillis v. Great Western R. W. Co.*, 12 U. C. R. 427; *Dolrey v. Ontario, Simcoe & Huron R. R. Co.*, 11 U. C. R. 600; *McLennan v. The Grand Trunk R. W. Co.*, 8 C. P. 413.

*Britton*, contra, cited *Denn. dem. Warren v. Fearnside*, 1 Wils. 176; *Bertie v. Beaumont*, 16 East 33; *Doe James v. Stanton*, 2 B. & Al. 373; *Leith v. O'Neill et al.*, 19 U. C. R. 233.

McLEAN, J.—The case of *Henderson v. Harper* in our own court (1 U. C. R. 481) shews that a tenant-at-will cannot set up such tenancy against his landlord, and that the entry on the land by the owner, and turning out his tenant at will, are justifiable for the purpose of terminating the tenancy at any time the owner may think proper. The pos-

essor of a parcel of land may maintain trespass against a stranger, but the owner will also be entitled to sue for any injury to his land, though it may be occupied by a tenant-at-will who merely holds without any interest derived from the owner. Though at first I was inclined to think that Daly must be regarded as in possession of the ground through which the horses passed to the railway, and therefore that the plaintiff could not maintain this action, I am now satisfied that the direction of the learned judge in the court below was correct, and that the plaintiff's action is sustainable. The defendants are bound by law to keep up fences to prevent horses and other animals from getting on the line of the railway, and if one of their own servants destroys or removes a portion of their fence, and injury is thereby caused to an adjoining proprietor, the defendants cannot excuse themselves by shewing that the injury was caused by the wanton and unauthorised act of their servant. The fact of the servant having been the cause of the injury to the plaintiff may have been the cause of increased damages, but they are not so large that they must necessarily be characterised as excessive. On all the grounds taken it appears to me that the verdict is right, and that the appeal must be dismissed with costs.

BURNS, J.—There was no complaint made of the way in which the judge of the county court left the case to the jury. He correctly enough told them that it was necessary, in order to the maintenance of the action, that the plaintiff should be in possession of the piece of ground from which the mares escaped upon the railway. In his judgment afterwards, in disposing of the rule to set aside the verdict, he remarked that the question of possession was one of fact for the jury, and this proposition cannot be denied.

The case of *Wildbor v. Rainforth* (8 B. & C. 4) very strongly supports the judge's view of this case. That was an action of trespass brought by the widow of a pauper who had been permitted to occupy a house rented by the overseers of the poor. Mr. Justice *Bayley* said that the plaintiff was merely an occupier by sufferance, and Lord *Tenter-*

*den* said the plaintiff was not tenant of the premises, but was allowed to occupy by the parish officers, and that her occupation was theirs.

It would be a very hard measure of justice indeed upon this plaintiff if we should be compelled to say that the judge had done wrong in refusing to grant a new trial, for the whole cause of the accident was occasioned by the servant of the railway company putting a gate in the fence, which he ought not to have done, and then negligently either leaving it open, or in such a way that the slightest touch must have opened it, so that by it the animals escaped to the railway track. I do not think we are obliged to find fault with the manner in which the judge has dealt with it in the court below, and, as expressed by Lord *Kingsdown* in the case of the "*North American*," (12 Moore, P. C. 338,) and repeated by Lord *Chemlsford* in the "*Schwalbe*," (4 L. T. Rep. N. S. 160,) "In order to advise the reversal of a judgment we must not merely doubt whether it is right, but be satisfied that it is wrong." The appeal should be dismissed with costs.

Appeal dismissed.

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## MEAGHER V. THE ÆTNA INSURANCE COMPANY.

*Marine insurance—Abandonment—Construction of policy—Inconsistent provisions.*

Defendants insured a vessel for \$5000 by a policy which provided, among other things, that no acts of the insurers or insured in case of disaster with a view to saving the property should be considered as a waiver or acceptance of abandonment, but should be without prejudice to the rights of either party: that the insured should not have a right to abandon in any case unless the amount which the insured would be liable to pay under an adjustment as of a partial loss, exclusive of general average, should exceed half the amount insured. A memorandum was *written* on the face of the policy, and set out in the plaintiff's declaration, as follows: "N. B.—It is hereby understood that the above-named vessel is insured against total loss only, and no claim for general average loss or particular average loss to attach under the policy."

The vessel struck upon a reef in the St. Lawrence, on the 30th of July, in calm water and where no wind could affect her. On the 6th of August the plaintiff gave notice of abandonment, but defendants refused to accept it, and ten days after they got her off and repaired her, at an expense in all of about \$3000, the declared value of the vessel being \$15,000.

- Held*, 1. That the written memorandum providing against a recovery except for total loss must prevail, although several printed conditions inconsistent with such an agreement were left in the policy.
2. That the negative provision, that the insured should not have a right to abandon unless, &c., (as above,) would not enable him to do so as of course in the event specified, if not otherwise entitled.
3. That the evidence shewed no total loss, actual or constructive, and that the plaintiff therefore had no right to abandon.

The test by which this right must be determined is whether a prudent man would think it worth his while to attempt to save and repair the vessel.

4. The policy having been prepared in the United States, where defendants were incorporated, and transmitted to their agent here with whom the plaintiff insured, that the law of this country and not of the foreign country should govern, the contract being in fact made here.

The plaintiff sued upon a policy of insurance effected by him on the 27th of April, 1859, for \$5000, to cover the period from the 16th of April to the 30th of November, 1859, on the steamer *Boston* belonging to him, and to be employed during that time on the lakes and rivers mentioned in the policy, including the river St. Lawrence from lake Ontario to Quebec.

In the policy the steamer with her tackle, apparel, and other furniture, was valued at \$15,000.

The assurance was against the perils of the lakes, rivers, canals, fires and jettisons, with the exception of loss or damage arising from certain causes specified, which exceptions it is not material to consider.

The policy as set out contained the usual provisions, that the insured should give the insurers prompt notice of any

loss or damage, and of the plan adopted for recovering the vessel: that the insured might take measures for saving and securing the vessel, without prejudice to his insurance, and might cause her to be forthwith repaired: that in case of his neglect or refusal to take such measures the insurers might interpose, and recover the vessel, and cause her to be repaired for account of the insured, or that the insurers should contribute to the expenditure, according to the proportion which the sum insured should bear to the valuation in the policy, which should form a lien on the vessel, and be recoverable against the insured, at the option of the insurers: that no particular loss or particular average should be paid by the insurer, unless amounting to 50 per cent. of the valuation: that losses should be payable in sixty days after proof of the loss or damage, and of the amount: that proof of the same, and of the interest of the insured, should be made and presented at the office of the company: that in all cases of loss or damage one third "new for old" should be deducted from the cost of repair, and no partial loss should be claimed unless amounting to a particular average, after such deduction: that the acts of the insured, or insurers, or their agents, in recovering, saving and preserving the property insured in case of disaster, should not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under the said policy, but such acts should be considered as done for the benefit of all concerned, and without prejudice to the rights of either party: that the insured should not have a right to abandon the said vessel in any case, unless the amount which the insured would be liable to pay under an adjustment, as of a partial loss, exclusive of general average and charges of the nature of general average, should exceed half the amount insured: that no abandonment in any case, whatever might be the right to abandon, should be allowed as cause for abandonment, unless it should be in writing, signed by the insured, and delivered to the company, or their authorised agent, nor unless it should be sufficient, if accepted, to convey to and vest in the said insurance company an unincumbered and perfect title to the subject abandoned.

And it was further set out in the declaration that by a memorandum endorsed upon the said policy it was agreed that the vessel was thereby insured against total loss only, and that no claims for general average loss or particular average loss should attach under the said policy.

The declaration contained the usual averment that at the time of insurance, and from thence till and at the time of the loss, the plaintiff was the owner of the vessel; and it was alleged that while she was navigating the river St. Lawrence on an upward trip from Montreal to Hamilton and St. Catharines, on the 30th of July, 1859, the *Boston* "was by the mere perils of the navigation wrecked in the said river, and thereby became wholly lost to the plaintiff, of all which the defendants then had due notice, and the plaintiff thereupon duly abandoned the said vessel to the said defendants, who then accepted the said abandonment," &c.

Besides some pleas which were demurred to, the defendants pleaded, 1st. That the vessel insured was not wholly lost to the plaintiff, as in the declaration alleged, and four other pleas, of which the 2nd and 5th were held bad on demurrer.

The third and fourth pleas, which were also demurred to, were adjudged to be good pleas in bar, and the plaintiff obtained leave afterwards to take issue upon them. (a)

The third plea was, "that the plaintiff did not duly abandon the said vessel, nor did the defendants accept the said abandonment as alleged."

The fourth plea was, "that the said abandonment in the declaration mentioned was not sufficient to convey to and vest in the said defendants an unincumbered and perfect title to the said vessel."

At the trial, at Toronto, before *McLean*, J., the printed policy was produced. It contained a memorandum written across the face of it, in the following words, in red ink: "N. B.—It is hereby understood that the above-named vessel is insured against total loss only, and no claim for general average loss or particular average loss to attach under the policy."

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(a) See 19 U. C. R. 530.



At the conclusion of the evidence *Galt*, Q. C., for the defendants, took a number of exceptions to the plaintiff's case, moving upon them as grounds of nonsuit, on which the learned judge reserved leave to him to move in term, and allowed the case to proceed. Very many witnesses were examined and a great mass of evidence received, chiefly upon the point whether the nature of the damage to the vessel was such as entitled the plaintiff to abandon her as a total loss, on the rule laid down, that if a prudent man could not be expected to incur the expense of attempting to save her under the circumstances in which she lay, the insured could properly give notice of abandonment; and also upon the point whether it would have cost more to get her off and repair her than fifty per cent. of her declared value, with the modifications which have been applied in regard to such estimates.

The main facts of the case were these: on Saturday, the 30th of July, 1859, the *Boston* in coming up the river St. Lawrence struck upon a shoal or reef, which runs out northerly towards point Iroquois, on the Canadian side of the river, in Upper Canada, where the river is probably from half a mile to a mile wide, the place being quite inland and many hundred miles from the sea.

This accident occurred about two o'clock in the day, from some cause not clearly accounted for in the evidence. She had some cargo in her, and the plaintiff was himself on board. A large boulder at the point of the reef came under the vessel about amidships; she hung upon this, and sank at the bow and stern till the water became level within her. From the situation in which she was, she was not exposed to the action of any sea, and could be easily got off and taken to a place of safety, if the nature and extent of her injury should be found to admit of it.

The captain telegraphed to Belleville for a steamer belonging to the plaintiff to come down to her assistance, and one arrived the next day and took off the cargo. On Monday the captain sent up a protest describing the accident to the defendants' agent at Kingston, and on Monday or Tuesday two gentlemen came down who were salvage agents—

one of them for an association of underwriters at Buffalo, and the other, Mr. Fortin, for the defendants and the Home Insurance Company of Buffalo, with which latter company the plaintiff had also insured the *Boston* in the sum of \$3000. The plaintiff got some shipwrights to examine the vessel, and so also did the defendants through their agents.

There was great discrepancy in the evidence as to the extent to which the *Boston* was injured, and what it would cost to repair her so as to make her as seaworthy as she was before the accident; but at present it is intended to state only such principal facts in the case as seemed to be proved without dispute, and as are necessary for determining the legal exceptions taken to the plaintiff's recovery.

On the 5th of August, six days after the accident, the plaintiff went to the office of the defendants' agent in Kingston, and said he would abandon the vessel, intimating also that he would claim for a total loss. The agent told him that he had nothing to say to that: that he had heard from the defendants and from others that the vessel could not be abandoned by him as a total loss, while she was lying as she was.

The next day (6th of August) the plaintiff took or sent to the office (the agent being absent) a written notice signed by him, that he had abandoned the steamer *Boston*, in pursuance of the terms of the policy, adding in it that he would exert himself to the utmost to save the vessel for the insurance companies, and not for himself, and that he held them liable for the whole amount of insurance money.

On the 12th of September the plaintiff delivered to the defendants' agent an affidavit made by him, stating the wreck of the vessel on the 30th of July, and referring to protests which he had before delivered, describing the particulars of the casualty. He swore in this affidavit that on the 6th of August he had given formal notice of abandonment, and that he claimed as for a total loss. In this same affidavit the plaintiff swore that on the 7th of January, 1859, he became the owner of the *Boston*, under a bill of sale from one Thomas Paton therewith submitted, and that he con-

tinued to be such owner from thence to the time of the wreck of the steamer.

There were produced at the trial, 1st, a mortgage dated the 21st of May, 1856, professing to be made by James Nixon, John E. Swale, and John Owen Nixon, of Hamilton, to Michael Wilson Browne, of the steamer *Boston*, to secure £8,875, stated to have been that day lent to them by Browne, and which was to be repaid to Browne on the 11th of November, 1856, with interest at six per cent. Prefixed to the mortgage was a table like that contained in the form of the English Merchant Shipping Act, 17 and 18 Vic., ch. 104, schedule I., in which it was stated that the *Boston* was built at Quebec, in 1852, and was registered there as a British built ship, and a particular description of her was given, with her registered tonnage.

The mortgagors thereby mortgaged the whole vessel in the words of the statutory form, covenanting that they had power to mortgage, and that she was free from incumbrance. And it was further stated in it that the mortgage was made on condition that the power of sale which by the Merchant Shipping Act, 17 and 18 Vic., ch. 104, was vested in the mortgagee, should not be exercised till the 11th of November, 1856.

It was marked as entered in the Custom House at Quebec, on the 21st of July, 1856, which entry was signed by the registrar.

There was next produced a bill of sale from M. W. Browne to James Coleman, dated 4th of June, 1857, and headed by a similar description of the steamer *Boston*, by which Browne, calling himself mortgagee of the ship *Boston*, as described above, and referring to the mortgage made to him by Nixon and Swales, transferred her to Coleman.

This appeared also to have been entered with the registrar of the port of Quebec on the 9th of June, 1857.

Next a deed was produced, dated the 4th of June, 1857, similar to the last in its form, and entered on the 9th of June with the registrar of the port of Quebec, by which Coleman transferred the *Boston* to Thomas Paton of Montreal.



And lastly, a deed from Thomas Paton, dated the 7th of January, 1859, by which Paton, in consideration of \$7,300, transferred the *Boston* to this plaintiff. This was entered on the 8th of February, 1859, with the registrar of Quebec.

No further proof was given at the trial of the execution of any of these deeds, than what was given by M. W. Browne, the mortgagee of Nixon and Swales, who being called as a witness for the plaintiff stated that the mortgage to him by Messrs. Nixon and Swales was executed by the three partners who were named in it; that they had purchased the *Boston* from him, and had given this mortgage back, to secure the purchase money.

He swore also that he executed the deed to Coleman, which was produced, he being then in possession of the vessel.

No proof was given of the execution of the bill of sale from Coleman to Paton, or of that from Paton to Meagher. He swore that the vessel was sold by auction by Paton, and that the plaintiff bought her at the sale for \$7,300 as he thought.

There was no evidence as to the interest of Browne in the vessel, when he sold her to Messrs. Nixon and Swales, as he said he did, or how he acquired it; nor was there any certificate of ownership in evidence, or any proof as to who was the registered owner.

There was no evidence of any offer by the plaintiff to convey his interest in the boat to the defendants when he claimed to abandon her, or at any time before action brought, nor any proof that he had exhibited his title, or disclosed the particulars of it.

On the defence, it was proved that the marine inspector of the defendants was sent down on the 1st of August by their agent at Kingston to inspect the vessel as she lay upon the reef. He described on the trial in what state he found her, and stated that he saw the plaintiff on board the *Boston*, who spoke of abandoning the vessel as a total loss, under a clause in his policy, contending that he had a right to do so if the injury was equal in amount to one half of the sum insured: that the plaintiff was informed by him, the

witness, that he did not consider the vessel a total loss, and would not assume the responsibility of so deciding till he heard from the defendants at Buffalo: that they then spoke of the best method of getting off the vessel: that no one considered it impossible to get her off: that the plaintiff was insisting that he had a right to abandon her: that the weather was fine, and no wind could affect her where she was: that he, the witness, was in the boat from the Tuesday after the wreck till the next Saturday, and returned to her again on the Wednesday following, when he brought men and scows, and proper appliances to get off the vessel. He swore that he remained with the vessel assisting and superintending till she was afloat, which was on the 16th of August, the plaintiff being there occasionally for the first two or three days, but making no attempt to get her off. He stated that when she was cleared of water by a steam pump which was brought down from Buffalo they raised her bow, and she floated off so easily when the steamer was attached to her that there was no hitch or jar in the movement: that in taking her up the river to Ogdensburgh they had to work the steam pump five or ten minutes in an hour, an account of leakage—not more. They were a week employed in getting her off.

The total expenses, including the steam pump, and all charges of taking her to the Marine Railway at Ogdensburgh, (but not of hauling her up,) amounted to \$2216 44c.

It was proved by other witnesses that the whole expense of repairing her and launching her again was \$839 93c., the expense of getting down and using the steamer forming by far the larger portion of the sum.

The general agent of the defendants at Buffalo swore that he came down to Ogdensburg, and was there the day the *Boston* was brought in, and that he saw the plaintiff there and conversed with him: that the vessel had then been attached by the witness for the amount of the expenses incurred in getting the vessel off, which the witness told the plaintiff they had incurred as salvors, in order that they might restore the vessel; and that they would give him up the vessel, and relieve her from the attachment, and

give him a year or two to pay the amount, upon giving security. The plaintiff declined that, contending that he was at liberty to treat it as a total loss, but he offered, as this witness said, to take the boat as she then lay at Ogdensburg, without repairs, if the defendants would pay the expense of raising her and getting her to Ogdensburg.

At this time the *Boston* had not been hauled out for repairs. The expenses it seemed were incurred by the two companies who had insured for the plaintiff.

The evidence was on many points inconsistent and conflicting to a remarkable degree. The learned judge charged the jury upon the general effect of the testimony in such a manner as the plaintiff's counsel seemed to consider unfavourable to his case, for he took a great variety of objections to the charge, which it becomes now not material to advert to, for the jury, being either unwilling or unable to dispose satisfactorily to themselves of the specific questions of fact which they had been asked to determine, gave a general verdict for the plaintiff for \$5,400, being the whole sum insured and interest.

The defendants were a foreign company, carrying on business at Hartford, in the United States, and the policy was prepared and transmitted from thence on the instructions of their agent at Kingston, with whom the plaintiff effected the insurance.

*Eccles*, Q. C., for the defendants, obtained a rule *nisi* for a nonsuit on the leave reserved, or for a new trial, on the following grounds :

1. That no total loss of the vessel insured in point of fact was proved at the trial.

2. That no constructive total loss of the steamer, by reason of damage or otherwise, within the meaning of the policy, was proved.

3. That no notice of abandonment of the said steamer by the plaintiff was proved to have been given to the defendants within a reasonable time.

4. That the abandonment attempted to be proved was insufficient within the meaning of the policy, because no



conveyance of the vessel was proved to have been made or tendered to the defendants.

5. That no title was shewn to have been in the plaintiff, so that he could within the meaning of the policy make a conveyance thereof to the defendants free from incumbrances.

And as regards a new trial, it was moved generally on the law and evidence and judge's charge.

*Crooks* and *M. C. Cameron*, shewed cause, and cited *Irving v. Manning*, 1 H. L. Cas. 287; *Arnould on Ins.* 2nd Ed., 90-91, 1012, 1067, 1074, 1089, 1106, 1107-9, 1113, 1165, 1172; *Kent Com.* iii. 321; *Bradlie v. the Maryland Insurance Company*, 12 Peters 397, 399; *Reimer v. Ringrose*, 6 Ex. 263; *Holdsworth v. Wise*, 7 B. & C. 794; *Dean v. Hornby*, 3 E. & B. 180; *Lozano v. Jansen*, 5 Jur. N. S. 1401; *Phillips on Insurance*, 1543, 1544, 1548; *Peele v. Merchants' Insurance Co.*, 3 Mason 27; *Gloucester Ins. Co., v. Younger*, 2 Curtis 322; *Reynolds v. Ocean Ins. Co.*, 1 Metc. 160; *Stewart v. Greenock Marine Ins. Co.*, 2 H. L. Cas. 176, 1 McQueen Sc. Ap. Cas. 328; *Scottish Marine Ins. Co. v. Turner*, 17 Jur. 631.

*Eccles*, Q. C., *Galt*, Q. C., and *Anderson* supported the rule, citing *Colgan v. London Assurance Co.*, 5 M. & S. 447; *Arnould on Ins.* 1166-7, 1000, 994; *Anderson v. Royal Exchange Assurance Co.*, 7 East 38; *Phillips on Ins.* secs. 1519, 1543, 1544, 1539, 1669, 1559, 1763, 1767; *King v. Western Assurance Co.*, 7 C. P. 300; *Moss v. Smith*, 9 C. B. 94; *Rosetto v. Gurney*, 11 C. B. 176; *Ralli v. Janson*, 6 E. & B. 422; *Kent Com.* iii. 299; *Hugg v. Augusta Insurance Co.*, 7 Howard 604; *Park on Ins.* 247, 252; *Cocking v. Fraser*, 4 Doug. 295; *Dyson v. Rowcroft*, 3 B. & P. 474; *Glennie v. London Assurance Co.*, 2 M. & S. 371; *Thompson v. Royal Exchange Assurance Company*, 16 East 214; *Davy v. Melford*, 15 East 559; *Roux v. Salvador*, 3 Bing. N. C. 266; *Godsall v. Boldero*, 9 East 72; *Naylor v. Taylor*, 9 B. & C. 718; *Cazalet v. St. Barbe*, 1 T. R. 187; *Doyle v. Dallas*, 1 Moo. & Rob. 18; *Cambridge v. Anderton* 2 B. & C. 691; *Reimer v. Ringrose*, 20 L. J. N. S. Ex. 175; S.C., 6 Ex. 263; *Gardner v. Sal-*

vador, 1 Moo. & Rob. 116; Tanner v. Bennett, R. & M. 182; Underwood v. Robertson, 4 Camp. 138; Parker v. Wallis, 5 E. & B. 21.

ROBINSON, C. J., delivered the judgment of the court.

We are to consider first what law is to govern. We think that of Upper Canada, for that the contract was in fact made in Kingston between the plaintiff and the agency there.

It would clearly have been so if the agent had given a receipt for the premium, for the insurance would have been substantially complete before the policy was made out. The policy being delivered at Kingston is the formal completion of the contract. Some argument may be derived from our statute of 1860, ch. 33.

But if it should be held that the law of the state of New York, where the seat of the corporation is, should govern, that would not affect the case as it stands before us, for there was no evidence of that law, and we cannot therefore assume that it is different from our own, and that total loss there has a different meaning from total loss here.

Then as to the policy:

The condition endorsed in writing on the face of the policy, "that the vessel was insured against total loss only, and that no claim for general average loss, or particular average loss shall attach under the policy," is no doubt to be read as part of the policy, and we cannot doubt that such was the deliberate intention of the parties. That indeed is not denied; but though this special provision forms part of the policy, all the rest of the instrument, as it would have existed in the printed form if there had been no such provision, has been left standing, and some parts of this general form of policy as they stand unaltered are inconsistent with the condition which makes the company liable only in case of total loss.

We are told in one part of the policy that no claim for general average loss or particular average loss shall attach under the policy, while in other parts of it we are told that the insured shall give prompt notice of "*any loss or da-*

*mage* : that no *particular loss*, or *particular average* should be paid by the insurer *unless amounting to 50 per cent. of the valuation* : that losses should be payable in sixty days *after proof of the loss or damage and of the amount*; and that *in all cases of loss or damage* one third new for old should be deducted from the cost of repair; and that *no partial loss* shall be claimed unless amounting to a particular average (that is, as above declared, 50 per cent. of the valuation) after such deduction.

These would all have stood with propriety as parts of the policy, if there had been no such special provision in it as restricts the claim which the insured can make under it to the case of total loss only, but they are inconsistent with that provision.

Then follows this very material condition : "The insured shall not have a right to abandon the said vessel in any case, unless the amount which the insured would be liable to pay under an adjustment as of a partial loss, exclusive of general average and charges of the nature of general average, *should exceed half the amount insured.*"

It is rather perplexing to know what to make of such a policy.

This, however, is plain, that the defendants can only be made liable as for a total loss, for their engagement is clearly and positively limited to that.

Then taking the policy and the evidence given at the trial, how does the case stand in regard to those legal exceptions which were taken as grounds of nonsuit, and reserved for our consideration here?

The first is that a total loss was not proved at the trial. Certainly an actual total loss was not proved, nor any thing approaching to it : that is indeed not attempted to be maintained on the plaintiff's side. The vessel was fast on a shoal in the river a few hundred feet from the shore, at midsummer, the calmest season of the year, and where in any season there would be no danger from the agitation of the waters. She was in a situation which admitted of all means for getting her off being easily taken, and of removing her afterwards to a place of safety where she could be readily



repaired. From the first no one seemed to doubt that she could be raised and restored, as in fact she has been, after freeing her from water and applying eight or ten days labour.

But the plaintiff being present at the time of the casualty, seems either then or very soon after to have made up his mind to make no effort to relieve the vessel, but to force her upon the defendants as a total loss, on the principle that the policy, as he assumes, entitled him to abandon her if he could make it appear that the cost of floating the vessel, getting her to a place of safety, and repairing her, would exceed *half the amount insured*. The defendants, on the other hand, seem to have been consistent from the first in their resistance of such a claim. They called upon the plaintiff to take measures for saving the vessel, but he would do nothing. Either party was at liberty to exert himself in restoring the vessel without prejudicing his position under the policy, for that is expressly provided for; and the defendants having got off the vessel with little difficulty, and offered to restore her on being repaid the expense they had been at, have shewn thereby very plainly that she was not an actual total loss.

Then was it upon the evidence a constructive total loss, admitting, as we suppose it must be admitted, that under certain circumstances different from those in evidence here, the plaintiff by abandoning the vessel and giving proper notice might legally claim as for a total loss under this policy, although the vessel had never lost her character as a vessel, but immediately after being got off had been taken to a convenient dock, and there repaired so as to make her, according to the testimony of the defendants, in a state as seaworthy as she was before the accident?

We do not think the plaintiff intended to insist on the argument that he could claim as for a constructive total loss, if he could shew that the expense of getting off the vessel and repairing the accident would exceed *half the amount insured*, though the policy would seem to make that the test.

He seemed rather to endeavour to bring himself within the rule, supported, as he says, by decisions in courts of the United States, that the insured can claim as for a total loss

when the expense of repairs (including the charge of floating the vessel) would exceed half of the value declared in the policy.

We cannot say whether the jury did or did not find in this case that the expense would amount to one half of the declared value—that is, to \$7500—for the jury would find nothing special, but simply gave their verdict for the plaintiff.

But it is enough to say that there is no authority for applying such a test according to the law of this province—in other words, the law of England, for we have no peculiar law or custom on the subject. The test by the law of England clearly is whether a prudent man would think it worth his while to attempt to save and repair the vessel, and it is assumed that he would not do it unless he had the prospect of gaining something by the attempt; in other words, that he would not make the attempt unless it appeared probable that the vessel, when got off and restored to the state she was in before the accident, would be worth as much as the operation would cost him. The English authorities have, as we conceive, at last fully established that as the criterion of a total loss.

Taken by that test, the evidence would certainly shew that the insured had no right to abandon as for a constructive total loss. We have no right to apply what the plaintiff contends is the American test, and if we had we must say it seems to us clear that the jury ought not to have found from the evidence that even so the plaintiff could rightly claim as for a total loss.

But we must dismiss that test altogether as one that we have no authority to apply, and then it only remains to consider whether we should apply the other test, more favourable than either the English or American general rule, to which this policy points, namely, that the right to abandon by giving notice exists when the expense of restoring would exceed half the amount insured—in this case half of \$5000.

When we say that \$5000 was the amount insured, we speak only of the amount covered by this policy, and do not include the other \$10,000 of the \$15,000, the declared value, for \$3000 of which the plaintiff had obtained another policy

from the Home Insurance Company, and for the remainder of which the plaintiff had taken the risk upon himself, and so was in one sense his own insurer. If these are to be included they would make \$7500 the sum with which we are to compare the cost of repairs, &c.

Taking it upon any mode of calculation that can be based upon the evidence, and making such deductions as it would be obviously proper to make from the \$6200 at which the estimate for repairs was calculated by the witnesses called on the part of the plaintiff, we have little or no doubt that the plaintiff was not entitled in fact to abandon by the facts as they stood at the time he gave the notice on the 6th of August. But his notice of abandonment was never in fact accepted; it was, on the contrary, always contended against. The plaintiff was called upon to exert himself for getting off his vessel and repairing her, but he declined. The defendants in consequence got off his vessel without difficulty and repaired her, and have offered to restore her. It is impossible to make out after this that this was a total loss. If the repairs which the defendants have had done to the vessel are not even worth the very sum which they have cost, \$700, and a little over, or if they have been such as to be of little use, it is enough for the present purpose that they have enabled the defendants to restore the vessel to the plaintiff, not a mere congeries of planks, but in specie as a steam vessel; and any question about the cost of the repairs can only properly come up, if at all, in a contest between the parties about the payment of those repairs to the defendants. Again, if much more must be done for making the *Boston* a safe vessel to navigate the lakes, that may depend much more upon what she was before the accident than upon the injury done to her by the accident; and if the injury from the accident calls for more yet to be done than has been done, before she can be justly said to be as seaworthy as she was before she struck on the reef, the only effect of that being established would be to demonstrate that the plaintiff has suffered more in the way of partial loss than he or others may at first have suspected; but such loss, whatever it may prove to be, was not one against which he



had chosen to protect himself by insurance, and he must therefore be content to bear it.

What has been done has proved that the vessel was never a total loss. She was in no danger where she lay of becoming a total wreck before she could be got off and taken to a place of safety, and there was abundant time and opportunity for doing so. If instead of being stuck on a bar in a river far inland, with cultivated farms, as we know, within a short distance of her on either side, she had stranded on a reef in the ocean, or in one of our large open lakes, she would have been liable to be overwhelmed and broken up by the first gale that occurred after the accident. The insured, or his agent, if he knew her to be in such a situation, and was satisfied that it was not worth his while to attempt to save her, might reasonably have endeavoured to throw the loss of the vessel on the insurers by giving notice of abandonment, and it would then have been for them to consider whether they would accept the abandonment, and apply themselves at once to the attempt to get the vessel off. Under the discouraging circumstance, that in the case supposed the risk was great and immediate of her being broken to pieces by the waves before they could float her, it is probable that the insured would have given notice of abandonment and held himself secure, whether the insurers should accept it or not, and that the insurers would have declined to accept the abandonment, and take the chance of what would follow. The vessel so situated as we have supposed would no doubt soon have become an actual total loss, and then the parties would have had to look to the consequences; but here the vessel as she lay aground in the river, was in no such dangerous position; she stuck fast, borne up in the centre by the rock on which she grounded, and both ends drooping from their weight, added to by the weight of the water which had gained admission at the bottom. She still remained a ship or vessel, not worth perhaps so much as she was valued at from the timber with which she was constructed, and from her state of decay, but not probably worth very much less than she was when she was insured, if we except what it would cost to get her off, and repair the injury she had received from taking the ground.

The defendants, without prejudice to their rights, were at liberty to get her off and repair her, so that they could restore her to the plaintiff, since he would take no steps to that end himself; and they did with ease, as it seems, float her and repair her, and offered her back to the insured, with her engines in her. Whether she was or was not when so tendered to the plaintiff as sound and seaworthy as before she struck, is not a point that can determine the question of her being a total loss, for she had been recovered and restored, and was then afloat and in safety, having sustained an injury, for repairing which the plaintiff would be liable to the defendants so far as they had repaired it, and the rest of the injury if it was not wholly repaired the plaintiff must himself have borne, since he chose to run all risk of partial loss.

There was certainly not in this case an actual total loss. There was not abandonment accepted by the defendants, nor, we think, such a constructive total loss as entitled the plaintiff to give notice of abandonment which could avail him, though not accepted, and which could warrant him in rejecting the vessel when repaired and tendered back to him, for she was not at the time of abandonment in imminent danger of total destruction.

It is laid down in Arnould on Insurance, p. 993, that "except in cases where the underwriter, by accepting or acting upon the abandonment, has precluded himself from taking any objection to its validity, it may be laid down as an universal principle, that no abandonment can have any effectual operation unless the state of things were such as to justify it at the time it was made." In *Roux v. Salvador* (3 Bing. N. C. 286-7) Lord Abinger has clearly explained the meaning and extent of this principle.

We refer also to the cases of *Smith v. Robertson*, (2 Dow. Parl. Cas. 474,) *McIver v. Henderson*, (4 M. & Sel. 584,) and to Mr. Arnould's Treatise, p. 994, and the cases cited there in the note (*n*) as establishing that by the law of England, "even although the facts were such as to justify the assured in giving notice of abandonment at the time he did so, yet he cannot insist on such notice, and recover as for a

total loss, if the thing insured be restored before he commences his action in such a state that he may be reasonably expected to take possession of it ;” and that “the nature of the damnification at the time when the action is brought is to be regarded as the criterion of the right to recover as for a total loss ; and if at that time what had antecedently been a total loss has by subsequent events ceased to be so, and become an average loss merely, a compensation for an average loss can alone be recovered.”

This statement of the law leaves still to be considered the effect of the contract shewn by the policy in this particular case. And as to that it appears to us that the memorandum in writing on the face of the policy, which the plaintiff recognises as a part of the policy, and properly, should be considered as shewing the footing on which the parties were, and should prevail, though it may be very inconsistent with other parts of the printed policy, which, as we may reasonably suppose, had for want of due care and attention been inadvertently left to stand, instead of being obliterated as parts of the printed form inconsistent with the condition in writing, which must have received the special attention of the parties ; and the effect of it, we think, is to enable the insured to claim only as for a total loss, which may be established, though it was not an *actual* total loss, by abandoning, provided the insured was by the nature of the casualty entitled to abandon ; and we think he was not in this case merely by the negative condition left standing in the policy, that the insured should not have a right to abandon *in any case* (that is, however imminent the danger of a total loss at the time) unless the amount which the insured would be liable to pay under an adjustment as of a partial loss, exclusive of general average, and charges of the nature of general average, should exceed half the amount insured.

That condition, if not nullified by the written minute on the face of the policy, being merely negative and restrictive, leaves in full force, we think, those principles of the law of England which we have cited, which deny the right to abandon unless there is imminent danger at the time of a total loss,



and which require that we are to look at the position of things at the time of commencing the action—the fact in this case being that the vessel had in the meantime been recovered, repaired, and offered to be restored in a navigable state, which shews that this was not a case of total loss, but of partial damage merely.

On the ground that the vessel in this case cannot on the evidence be held to have been lost either actually or constructively, our opinion is that the rule for a nonsuit should be made absolute; and we think it therefore unnecessary to go into some other points which were argued: for instance, as to the defendants' right on the evidence to succeed on the fourth plea, and as to the insufficiency of the evidence to shew a constructive total loss, upon the principle that the cost of repairs, &c., would exceed one half of the sum insured upon the construction that should be given to that condition.

Rule absolute for nonsuit. (*a*)

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During this Term the following gentlemen were called to the bar:—GEORGE HENRY DARTNELL, JOHN DAVISON, WILLIAM HORATIO RADENHURST, HENRY O'BRIEN, FREDERICK PROUDFOOT, WILLIAM FERGUSON, JUNIOR, WILLIAM DANIELL, NATHANIELL BALDWIN FALKINER, DUNCAN MACMILLAN, JAMES CLELAND HAMILTON, JAMES PENNINGTON MACPHERSON, JOHN ROBERT McLAREN, JOHN ANDERSON ARDAGH, GEORGE BARTHOLOMEW BOYLE, FREDERICK LAMPMAN.

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(*a*) There was a similar action in the Common Pleas by the same plaintiff against the Home Insurance Company, in which the same questions arose, and the same judgment was given as in this court.

TRINITY TERM, 25 VICTORIA, 1861.

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*Present:*

THE HON. SIR JOHN BEVERLEY ROBINSON, BART, C. J.

“ ARCHIBALD McLEAN, J.

“ ROBERT EASTON BURNS, J.

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THE QUEEN V. CHARLES J. S. ASKIN, ADMINISTRATOR  
OF DUNCAN MCGREGOR ASKIN.

*Lien—Innkeeper—Special agreement.*

In *sci. fa.*, upon a bond to the Crown, it appeared that A., the obligor, had lived at an hotel with his family for some time, using his own furniture; that when he wished to leave the landlord objected to the removal of the furniture until payment of his bill, and that the obligor consented that a large portion of it should remain as security.

*Held*, that although the landlord could have no lien as an innkeeper, A. being in his house as boarder upon a special understanding, yet that he was clearly entitled to it by the agreement with A., and that A's administrator was justified therefore in paying him, as against the Crown.

*Scire facias* on a bond of the intestate, bearing date the 7th day of September, 1857, in the sum of £1800.

*Plea*, by the administrator, that there are no assets of the intestate except to the amount of \$100. Issue taken on that plea on behalf of the Crown, with a prayer of assets *quando*.

At the trial at Goderich, before *Hagarty*, J., it appeared by the evidence that the goods of the intestate were sold under the direction of the administrator, by public auction,

and produced the gross sum of \$995 86, which amount was subject to various charges attending the sale, and deductions from a re-sale of some articles sold at the first sale, but not taken by the purchasers, and some articles still remaining on hand and not re-sold. It appeared also that the intestate and his family boarded for a long time at the "Tecumseth" hotel, and were indebted to the landlord in a large sum for board and lodging furnished by him: that when about to move into other quarters from the hotel the landlord objected to the removal of the furniture of the intestate until the amount due for board should be paid; that thereupon the intestate consented that the landlord should retain a considerable portion of the furniture until the debt due to him for board should be discharged: that the furniture remained in possession of the inn-keeper under this arrangement; and that the administrator was obliged to pay him \$632.48, and a sum of \$56 50, for goods bought at the sale, to induce him to give up the goods to have them sold; and that the account for board was ascertained to be correct before such payment was made to him.

A verdict was taken for the penalty, £1800, and damages assessed on the breaches at \$100, with leave to the counsel for the Crown to move to add to the verdict the amount of the proceeds of the intestate's goods, if in the opinion of the court they were liable to be sold for the benefit of the Crown on account of the debt due by the intestate.

*R. A. Harrison* obtained a rule *nisi* in accordance with the leave reserved. He cited *Wms. on Exrs.* I. 850, II, 1683; *Selw. N. P.* II. 777; *Add. on Cont.* 2nd ed. 420; *Kent Com.* I. 594-5.

*J. Wilson* Q. C., shewed cause.

McLEAN, J.—The intestate and his family were, as it appeared by the evidence, lodgers in an inn for a considerable period of time, and incurred a debt of \$688 98 for their board and lodging there, which they were unable to discharge when about to move into a different residence. They had furniture of their own which they used in their lodgings,



and which they had brought with them when they came there.

We may therefore assume that they were in the house as boarders under a particular understanding, rather than as guests at an inn. The goods not being such as an ordinary guest would bring to an inn for his own convenience, there must have been a permission by the landlord to have them used as part of the furniture of that part of the house occupied by the intestate, and no lien could be acquired by the inn-keeper on goods so used for the supplies usually furnished by him in the course of his business, and which were furnished rather as a boarding or lodging-house keeper, than in the capacity of an inn-keeper. However, it appears that when the goods were about to be taken from his house to some other by their owner, the landlord of the inn objected to their being taken till the amount due for boarding should be paid, and the deceased being willing to leave the goods consented to the landlord retaining them till the account was satisfied, and in consequence of this arrangement they continued in the Tecumseth House as a security to its landlord, Bennett, and were there at the time of the death of the intestate, to whom they belonged. Though no lien was acquired on these goods prior to that arrangement respecting them, yet from that time there is no doubt that the landlord could by right retain them till his account for which they were security was discharged. "A lien" is laid down to be "a right to possess or to retain,"—*Ex parte Heywood* 2 Rose 355,—and any one who, unlike carriers and inn-keepers, is not obliged to receive a customer's property, may impose what conditions he pleases on the receipt of it; therefore he may stipulate for a lien for his general balance on any property received by him in the course of his business—*Kirkman et al. v. Shawcross* (6 T. R. 14.) Now there can be no doubt that after an agreement on the part of the intestate that his goods should continue in his creditor's hands till the debt should be paid, the creditor was fully entitled to retain them.

In the case to which I have last referred, it was held that where the defendant and a number of bleachers of yarn

having found themselves frequently prevented from recovering balances due to them by parties by reason of having no right to retain the yarn till paid, gave public notice that they would not give up yarn bleached by them till paid for their labour in bleaching, and the bankrupt being aware of their terms sent yarn to the defendant, and he retained it till his account should be paid, the assignees could not recover till the lien on the yarn was discharged; and Lord *Kenyon* in giving judgment said, "That in every case that had occurred, and in which the question of lien had arisen, it had been the universal wish of the courts at all times to extend the lien as far as possible;" and he adds, "in most of the cases where it has been determined that the party had no lien, the difficulty arose from the general law not creating a lien in that instance, or from the want of an agreement that the party should have a lien; but in this case there is an express agreement between the parties that the defendant should have a lien for his general balance. That agreement, so far from being illegal, is founded on justice, and therefore it is binding on the plaintiffs."

The case of *Richards v. Symons* (8 Q. B. 90) is much more recent and more in point than the case I have mentioned. In that case the plaintiff had a cow at grass in the defendant's field, and being indebted for the agistment agreed with him that the cow should be a security; that he would not remove her till the defendant was paid, and that if he did defendant might take her wherever she might be, and keep her till he was paid. The plaintiff removed the cow, not having paid the debt, and the defendant seized her on the high road. In an action of trespass for the taking, it was held that the agreement might be set up as a defence under the plea that the cow was not the plaintiff's.

The goods which the administrator had to pay for to the landlord of the inn amounted, according to the evidence, to \$688 98, which, with the necessary expense attending the funeral, and some other items admitted to have been correctly disbursed, \$206 08, must be deducted from the gross amount of the goods, \$995 86. The balance will be reduced

to \$100, the precise amount admitted by the plea, so that there will be nothing to be added to the verdict.

BURNS, J., concurred.

The CHIEF JUSTICE having been absent during the argument gave no judgment.

Rule discharged.

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VANEVERY ET AL. V. THE BUFFALO AND LAKE HURON  
RAILWAY COMPANY.

*Agreement—Construction—Liability for moneys received by purser, and for goods supplied to steamer.*

Defendants entered into an agreement to advance money to the plaintiffs to enable them to procure a steamer which was to run in connection with defendants' railway, and guaranteed them against loss up to a specified sum. The earnings of the vessel were to be shared as provided for; and it was agreed that defendants should name and pay a person to act as purser, and keep an accurate account of the receipts and expenditure. He was to be subject to their authority, but to mess with the captain at the plaintiffs' expense.

*Held*, that defendants were not liable to account to the plaintiffs for moneys received by him and not paid over.

The plaintiffs also claimed for goods supplied to another steamer, but it was shewn that this vessel was chartered to one W., who ran her on his own account, of which the plaintiffs had notice. *Held*, that they could not recover.

ASSUMPSIT on the common counts. Pleas, never indebted, payment, and set-off.

At the trial, at Goderich, before *Draper*, C. J., after the plaintiffs had closed their case and the defendants had examined a witness, the plaintiffs agreed to take a non-suit, with leave to move the court to enter a verdict for them for the three first items of their account, No. 1, for \$39 85c., No. 2 for \$11 37c., and No. 3 for \$28, amounting together to \$79 22c.; and that the affidavits of J. K. Gooding and J. L. McCormick might be read by the court, in order to decide as a jury would decide on the evidence therein contained whether the plaintiffs were entitled to such verdict, and to add to that the further sum of \$193 64, if the evidence on the judge's notes would sustain such verdict, and the plaintiffs were in law entitled to recover;



defendants to be at liberty to file the charter party of the steamer *Troy*.

*J. Wilson*, Q. C., obtained a rule calling on the defendants to shew cause why the nonsuit entered should not be set aside, and a verdict entered for the plaintiff for \$79.22 and \$193.64, or for either or both sums, or any part of either, pursuant to leave reserved at the trial, if the court should be of opinion that the plaintiffs were entitled to recover on the evidence, and on affidavits to be filed of one Gooding on the part of the plaintiffs, and an affidavit to be filed by the defendants if they should choose to do so.

*E. B. Wood*, for the defendants, shewed cause against the plaintiffs' rule, and filed, pursuant to leave reserved, the charter party of the steamer *Troy*, which had been run in connection with the defendants' railway, for supplies for which steamer part of the plaintiffs' cause of action against defendants was, the boat being owned by them.

During Easter Term *J. Wilson*, Q. C., supported the rule.

Though leave was reserved to the plaintiffs to file affidavits from Gooding and McCormick none were filed, and the plaintiffs' right to recover rested on the evidence received at the trial, which is fully stated in the judgments.

McLEAN, J.—It appears that in the year 1859, the defendants being anxious to have a steam boat communication opened from Gooderich to East Saginaw in the state of Michigan, so that it might be in connection with their railway, and establish a route for the transport of goods and passengers from Buffalo to Saginaw, entered into an agreement with the plaintiffs to induce them to purchase a boat to be run by them on the proposed route, with certain stipulations as to the part to be performed by each for the mutual advantage of both parties. The defendants agreed to advance \$5000 to the plaintiffs to enable them to procure a sufficient boat to be placed on the communication, and mutual stipulations were entered into as to the amount to be charged for freight and passengers, and for the payment by one to the other of

a portion of the moneys received according to the services rendered by either. For the purpose of keeping an accurate account of the expenses of the boat, and of the moneys received on board of her, it was agreed that the defendants might name a person to act as purser on board, and to be entitled to mess on board with the captain; his wages, however, to be borne by the defendants. He was to be subject to the authority of the defendants, but to do the usual duties of a purser on board.

Under that agreement, bearing date 29th of June, 1859, the plaintiffs procured and placed upon the route the steamer *Kaloolah*, and one J. L. McCormick was placed on board as purser by the defendants, for the purpose of keeping the accounts of the boat and doing any other duty otherwise usually devolving on a person in that situation. The three first items in the plaintiffs' account, for which leave was reserved to the plaintiffs to move to have a verdict entered, were for moneys alleged to have been received by McCormick while he was purser on board of the boat and not paid over to the plaintiffs, and the only evidence of the receipt of such moneys consisted of receipts signed by McCormick.

The defendants objected that they were not liable for any moneys received by McCormick: that though they nominated him as purser, and paid his wages on board of the boat, he was only placed there as a person in whom they had confidence to keep the accounts and to discharge the general duties of purser for the plaintiffs, so that at proper periods there might be no difficulty in settling the accounts according to the stipulations of the agreement as to the running of the boat.

There was a further objection, that McCormick had nothing whatever to do as purser in receiving freights or other moneys elsewhere than on the boat, and that the moneys for which the receipts were given appeared to have been received from a Mr. Gooding, the agent of the steamer at Saginaw, or the purpose of being transmitted to the plaintiffs, except to the amount of \$11.37, freight on goods sent by railway and steamer from Buffalo to Saginaw, of which amount \$5 25 was freight on the railway.

The through manifest of railway and steamer charges, amounting to \$11.37, receipted by McCormick on the 12th of October, 1859, was produced, and the witness, Jonathan Black, the plaintiffs' book-keeper, proved the signature of McCormick to the receipt, and also to a receipt on a similar manifest dated 5th of October, 1859, the freight on which amounted to \$39.85. He produced the ledger kept by McCormick as purser on board of the boat. By that the two first items, \$39.85 and \$11.37, appeared to be entered as due to the *Kaloolah*, and in another entry McCormick charged the plaintiffs with \$28 as paid to them on account of freight. The receipt the witness says purports to represent the \$28 to be money received from Gooding on account of produce shipped by the plaintiffs to Gooding on consignment. The two first items are charged to Gooding in the ledger as unpaid.

On cross-examination the witness Black stated that he was employed at the wharf at Goderich, and Gooding on the American side. If goods were consigned to Gooding he had to collect the freights: Gooding acted as agent for the steamer at Saginaw. The first item was for freight on goods consigned to Copland & Co., at Saginaw, the second item was for freight under similar circumstances, \$11.37, but the witness never knew of McCormick collecting freights at Saginaw except in these two instances.

There was nothing to shew any liability on the part of the defendants for moneys received by McCormick in his capacity of purser of the plaintiffs' boat. He was not there as the servant of the defendants exclusively, though they paid him and he was placed there at their instance. He was performing a duty for the plaintiffs in fact, and all that was required of him by the defendants was an accurate account of moneys received and expended by the boat, as the defendants had by their agreement covenanted to guarantee the plaintiffs against loss by their enterprise in running the boat. If it had been intended that the defendants were to be responsible for McCormick, there would no doubt have been some stipulation to that effect in the agreement between the parties, but that such was not the case is manifest from the



fact that on the 14th of February, 1860, a settlement of accounts between the plaintiffs and defendants took place at Brantford, in which nothing whatever was said of the items claimed on account of McCormick, and a balance was then struck by which the plaintiffs became indebted to defendants in the sum of \$3799.55. That sum, according to the evidence of defendants' secretary, Mr. McLean, was paid to him, and he gave a receipt for the amount. In the plaintiffs' account on which that settlement took place were two charges which were again brought forward in the particulars in this suit, \$80, one half of J. K. Gooding's salary as agent for the steamer *Kaloolah*, and \$20, one half of his travelling expenses, but these items were then deducted from the amount of the plaintiffs' accounts, and they paid the full balance remaining after such deduction. No further evidence has been given in reference to these items, and they must be taken to be abandoned.

The residue of the plaintiffs' account was for articles furnished to the steamer *Troy*, belonging to the plaintiffs, while running on the same route as the *Kaloolah* in connection with the defendants' railway. To that portion of the demand the defendants object, on the ground that the steamer *Troy* during the whole period was chartered to one Henry Whittaker, who ran her exclusively on his own account. It was proved that the *Troy* was registered at Buffalo in the name of Mr. William McLean, secretary for the company: that during July, 1859, that boat was run under charter by Captain Whittaker on his own account; and Mr. Fell, the general agent of the defendants, proved that on the morning the *Troy* arrived at Goderich he told the plaintiffs that she was run by Whittaker on his own account, and that the defendants were not at all responsible. This witness stated expressly that he had himself told the plaintiff Rumball of that fact, and that the plaintiffs knew the conditions on which the boat was run, and that the account for goods furnished to her was, for the first time, sent in to the defendants a month or six weeks before the trial; that a person of the name of Hirst was put on board of the *Troy* by the defendants, for the express purpose of making it known that Whit-

taker, the captain, had no right to charge the defendants by his contracts, and that it was in reference to the law of the United States especially that Hirst was charged with the duty, to avoid a lien attaching on the boat by Whittaker's contracts.

The charter party made to Harvey Whittaker, bearing date 23rd June, 1859, was not produced on the trial, but it has since been produced pursuant to leave reserved, and shews conclusively that Whittaker was to run the boat wholly on his own account, and bound to return her free from any charges on the expiration of his term. On the whole case as it now appears, I do not see that the plaintiffs have established any grounds for disturbing the nonsuit, and the rule must therefore be discharged with costs.

BURNS, J.—The charter party between R. S. Carter, the registered owner of the steamer *Troy*, and one Harvey Whittaker, shews that the steamer was leased to Whittaker for the year 1859, to run from Goderich to Green Bay in the state of Wisconsin, in the United States, and to run in connection with the Buffalo and Lake Huron Railway, charging a specific fare from Buffalo to the different ports on Green Bay, which was to be divided between the railway company and the boat in proportions mentioned in a schedule. The charter party provides that Whittaker will run the steamer at his own cost, expense, and charge, and furnish and supply her with all necessary outfittings requisite. It contains that Whittaker will, in all cases, in his own individual name and on his own responsibility, and not in the name or on the credit of the boat, make all purchases. Various other stipulations are put in for the purpose of guarding against the effect of the laws of the United States with regard to lien on the vessel for supplies or necessities furnished to her. In the present case the plaintiffs furnished provisions and wood in Goderich. The law of England is that the mere fact of one standing as the registered owner is not sufficient to shew that he is liable for the price of stores furnished to the vessel; but in this case it is not shewn that the defendants were the registered owners; at the utmost it was stated by

parol evidence that another person was the registered owner in Cleveland, for the benefit of, or as a trustee for, the defendants. Besides this, however, it was proved at the trial that the plaintiffs were informed, before any part of the account they seek to recover was incurred, that the steamer had been leased to Whittaker, and that the railway company would not be answerable for supplies furnished to her. Under these circumstances there is no question the plaintiffs cannot recover against the defendants for any part of the charge made in respect to the steamer *Troy*.

The claim in respect of the *Kaloolah* arises in this way: the plaintiffs and the defendants on the 29th of June, 1859, entered into an agreement by which the plaintiffs were to buy or charter a steamer, and run her twice a week from Goderich to East Saginaw during the season of 1859, and the defendants were to guarantee the expenses of the boat to the extent of \$100 per round trip. The boat was run in connection with the railway, and each party were to be entitled to receive and should receive from the charges for freight and passengers which should be carried by the said boat to Goderich, and thence eastward by the railway, or by the said railway to Goderich, and thence by the boat northward, according to the rates in a schedule annexed. And it was provided that the settlement for the season should be in this manner: that the defendants should be debited with \$200 per week during the season, and then that if the aggregate earnings during the whole season did not amount to the total sum thus guaranteed that the defendants should pay the deficiency.

Then comes the provision upon which the question turns with respect to the \$78.22, which is this: "The company shall have power to place on board the said boat, during all the time aforesaid, a purser, who shall have the usual powers and shall discharge the usual duties of a purser on board vessels, and shall keep an account of the receipts and expenditure of the said boat, and be subject to the authority of the said company. The wages of the said purser shall be paid by the said company, but he shall 'mess' on board with the



captain of the said boat, and at his table, at the cost of the said Vanevery and Rumball."

It was proved that the purser had received the \$78.22 for freight, which it was said he had not accounted for to the plaintiffs, though he had accounted for every thing else. It was proved that on the 14th of January, 1860, the plaintiffs and defendants settled their accounts for the season of 1859, and the plaintiffs paid to the defendants the balance due them of \$3799.55, and then made no claim whatever for any sums received by the purser and not accounted for, and no claim was made until the bringing of this action. The question now is whose clerk or agent the purser was during the time he was on board in the character of purser. The plaintiffs contended that he was the clerk of the defendants, and that they should be answerable for those \$78.22. On the other hand, the defendants contended they only reserved to themselves the power of appointment of the purser, and paid his salary, in order that they might have a guarantee that they were properly dealt by in the account of the receipts and earnings of the steamer, and that he was under the authority of the captain, and subject to the plaintiffs keeping him or not, and accountable to the plaintiffs.

I certainly take the same view in that respect as seems to have struck the learned Chief Justice at the trial by his directing a nonsuit. The vessel belonged to the plaintiffs, and the freight would be the property of the owners for the time being. They alone could collect it or sue for it if necessary, the defendants could do neither; and although the defendants could under the power reserved to them appoint a receiver, and though the defendants were to pay him for so doing, yet his accountability would be to the true owners, who in this case were undoubtedly the plaintiffs. It is clear they must have so understood the purser's position, for he accounted for all with the exception of this sum to them, and they have settled with the defendants upon that basis. It is not, perhaps, unlikely, if we had the purser's statement, that it would turn out that even that sum was accounted for. The account which he was to keep was not only of the receipts but of the expenditure of the vessel, and it was not pretended

that any other than the plaintiffs themselves were to expend any thing, though undoubtedly the defendants were interested in knowing that a correct account of the expenditure was kept.

I think the plaintiffs' rule should be discharged.

The CHIEF JUSTICE having been absent during the argument gave no judgment.

Rule discharged.

### IN THE MATTER OF CHARLES WIDDER AND THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

*Consol. Stats., C., ch. 66, sec. 5—Construction of—Lands injuriously affected—Right to compensation.*

One W. owned land upon the navigable river Maitland extending to high water mark. The Buffalo and Lake Huron Railway Company constructed their road upon the river, not touching his land, but connected with the bank above and below it, thus shutting him out from the river except across the railway.

*Semble*, that his land was not "injuriously affected," so as to entitle him to compensation under the Railway Act, sec. 5.

*Quære*, whether the statute applies in any case where the land itself is not injured bodily, though the owner may sustain damage by its depreciation in value or otherwise.

*Quære*, also, whether the power given to this company by their special act, 19 Vic., ch. 21, sec. 36, is controlled by secs. 136 and 138 of the Railway Act, notwithstanding the provisions in sec. 139.

*C. Robinson* obtained a rule *nisi* on the Buffalo and Lake Huron Railway Company to shew cause why a *mandamus* should not issue, commanding them to serve a notice upon Charles Widder, Esquire, containing a description of the powers intended to be exercised by them with regard to his land described in the affidavit filed, a declaration of their readiness to pay some certain sum as compensation for damages likely to arise to the said land from the exercise of their powers, and the name of an arbitrator to be appointed on their behalf if such offer be not accepted; and to proceed to make compensation to the said Widder for the damage to the said land, injuriously affected by the exercise of the said powers in the affidavit set forth, and to determine the amount of such compensation in the manner provided by "The Railway Act."

It was admitted that the railway company had been required to appoint an arbitrator, and to have the damages ascertained, as the applicant desired, and that they refused, because they denied the right of the applicant to any such compensation as he was seeking to obtain.

Mr. Widder made an affidavit that he was the owner of certain lands which he specified, and which were near the mouth of the river Maitland, lying along the bank of that river, and bounded by the river on the north, and that the land was conveyed to him by the Canada Company in the year 1852: that the Buffalo and Lake Huron Railway had nearly completed a line of crib work upon the river, rising about four feet above the surface of the river, and extending along the whole river front of his land, and connected with the bank of the river above and below his land, the effect of which was to shut out all access from his land to the river, except across the said crib work: that he was informed by the engineer of the company in charge of the works that they intended to lay down the track of their railway parallel to the line of crib work, between it and his land, and to fill up with earth the space between the crib work and his land: that the river Maitland is navigable from its mouth, where it enters into lake Huron, up to and above his land: that before the erection of the said work he had laid out his land into lots, which he believed would have been valuable and saleable as water lots, having a frontage upon the river, but that such value, and all prospect of selling the lots, was wholly destroyed by the works of the company.

He shewed that in September, 1860, he notified the company that he intended to claim compensation, and requested them to state whether they were prepared to settle the same in the usual way, and that he received for answer that the railway works were being constructed on the company's property, and that they could not understand why any notice relating thereto should be given to him.

A sketch was appended to his affidavit shewing the situation of his land in relation to the river and to the railway.

*E. B. Wood* shewed cause.

On the part of the railway company, it was shewn that by



letters patent dated the 28th of July, 1835, the Crown deeded for 21 years to the Canada Company (with other property) the water lots in the river Maitland, extending from Lake Huron up the said river to a distance considerably beyond the land of Mr. Widder, with such conditions contained in it as shewed that the government treated the river in that part of it as a navigable water, and provided for protecting the general privileges of the public in it.

And an affidavit was filed, made by the engineer of this railway company, and referring to a plan shewing the position of the railway track. This affidavit stated that the company, by deed of purchase from the Canada Company, dated the 14th of June, 1859, became the owners of the harbour at Goderich, and of the bed and soil of the river Maitland, and of the islands therein, below, and adjacent to, and along, and opposite to, and above Mr. Widder's lands: that Mr. Widder's deed limited his lands on the north by the high water mark of the river Maitland, expressly excluding him from all special right in the river and its waters: that the railway and work did not touch or encroach on the lands of Mr. Widder, but were entirely north of them: that the top of the bank on which his house stood was on an average 120 feet high, ascending from the river at an angle of 30 degrees, and was so rugged and steep that it could not be ascended except by persons on foot, and even so with difficulty.

*E. B. Wood*, for the Railway Company, cited Angell on Watercourses, 10, 17, 51, 535; Carroll v. The Great Western Railway Co., 14 U. C. R. 614; Wright v. Howard, 1 Sim. & St. 190; Child v. Starr et al., 4 Hill 369; Gould v. Hudson River R. R. Co., 12 Barb. 616, 622; Shelford on Railways 428; Wilkes v. Gzowski et al., 13 U. C. R. 312; Small v. The Grand Trunk Railway Co., 15 U. C. R. 283; Wilkes v. The Hungerford Market Company, 2 Bing. N. C. 287; Snure v. The Great Western Railway Co., 13 U. C. R. 376; Wismer v. Great Western Railway Co., Ib. 383; Day v. Grand Trunk Railway Co., 5 C. P. 420.

*C. Robinson*, contra, cited East and West India Docks and

Birmingham Junction R.W. Co. v. Gattke, 3 McN. & G. 155; Glover v. North Staffordshire R. W. Co., 20 L. J. Q. B. 376; Regina v. Eastern Counties Railway Co., 2 Q. B. 347; Bell v. Hull and Selby Railway Co., 6 M. & W. 700; Rose v. Groves et al., 5 M. & G. 613; Addison on Torts 104; Woolrych on Waters 204.

ROBINSON, C. J., delivered the judgment of the court.

The first question is whether it is clear that the proprietor, Mr. Charles Widder, can claim compensation for the injury which he complains of.

The Buffalo and Lake Huron Railway Company is incorporated under the statute 19 Vic., ch. 21. By the 33rd section of that act they are placed under the operation of the Railway Clauses Consolidation Act, at that time 14 & 15 Vic., ch. 51, now ch. 66 of the consolidated Statutes of Canada; and by section 36 of 19 Vic., ch. 21, they had power given to them to construct the work which gives rise to this question: that is, to continue their railway "to any point on the river Maitland, or to the waters of Lake Huron, at or near the town of Goderich."

Whether such power is to be considered as controlled by the 136th and 138th sections of the Railway Act, ch. 66, Consol. Stats., C., notwithstanding what is provided by the 139th section, it may be material to consider, because if the company had not authority to construct their railway where they have constructed it they would be simply trespassing, and we should have no authority to deal with them or with this application as if they had proceeded under the powers of the Railway Act. We assume at present that they had legal power given to them to do what they have done.

Then by section five of the Railway Act, it is provided that "for the value of lands taken and for all damages to *lands injuriously affected by the construction of the railway in the exercise of the powers by this or the special act, or any act incorporated therewith, vested in the company, compensation shall be made to the owners and occupiers of, and to all other persons interested in, any lands so taken or inju-*

riously affected." And by the next section it is enacted that unless otherwise specially provided by that act or the special act, the amount of such compensation shall be ascertained and determined in the manner provided by that act, which is by arbitration.

"Damages to *lands* injuriously affected by the construction of the railway," &c., is the language of our statute. Does that include a claim like the present, where the *land* of the applicant is *not injuriously affected*, but where it is correct rather to say that the enjoyment of the land is rendered less valuable, or convenient, or agreeable, by something rightfully done outside of it? There is no damage here done to the land. The allegation is rather that the owner of this land sustains damage as owner by something rightfully done on adjoining land, which makes no change upon the land itself, on the surface or otherwise.

The language of the English statute on which the case of *The Queen v. The Eastern Counties Railway Co.* (2 Q. B. 347, 2 R. W. Cas. 736) was decided is very different. It provides (secs. 9 and 28 and several other clauses) for compensation to the owners of lands "for all damages *by them sustained*" in or by reason of the execution of the powers granted by the act.

It is material to consider the following parts of our Railway Act, namely, sections 4, 5, 6, sec. 7, subsec. 3, sec. 9, subsecs. 3, 5, sec. 11 throughout, secs. 138-9.

We perceive nothing in them which seems to do away with the effect of that distinction between *lands* being *injuriously affected* by the railway, and persons sustaining damage from the construction of the railway.

The proprietor in this case has a right to go to the high-water mark of the river Maitland. The defendants' works are placed in the water of the river. The bed of the river for all that appears belongs to the Crown, and if any person by direction or authority of the Crown had for any purpose erected a wall along the bank of the river, or put up any work on the edge of the river, and extending only towards and in the water, would each of the proprietors along the bank, and having no right in the soil beyond the edge of the water, have had a right to bring a civil action against



the person who did it ; or would he have a right to complain of any other injury than that as one of her Majesty's subjects he was excluded from access to the river from his land ? And if he could for this common injury bring a several action instead of relying upon his remedy by indictment, would his ground of complaint be that his lands were injuriously affected, or that he as owner of the land had suffered damage from the loss of a convenience or privilege of using the river which lay outside of his lands ?

In *Day v. The Grand Trunk Railway Company*, (5 C. P. 420,) the court of Common Pleas seem in principle to have decided this question against the claim of the proprietor to recompence.

So far as we have been able since the argument to investigate the very important principles involved in this application, we are not convinced that this applicant has a claim to compensation, but the question is a general one of much consequence to be clearly set at rest, and we have no objection to grant a rule for a mandamus *nisi*, as was done in the case of *The Queen v. The Eastern Counties Railway Co.*, (2 Q. B. 347, 2 R. W. Cas. 736,) in order that the question may be decided in such a manner upon record as will allow of an appeal.

The applicant will consider whether it is worth his while to incur the expense of such a proceeding, while we do not at present incline to accede to his view of his rights, but the contrary.

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## FERRIE v. JOHN WRIGHT AND JOEL TOMLINSON WRIGHT.

*Deed—Construction of—Description of land.*

The mortgage under which defendants claimed described the land as all those certain parcels or tracts of land situate in the township of N., containing by admeasurement  $2\frac{1}{2}$  acres more or less, being composed of part of lot No. 23, in the 5th concession of the said township of N., particularly described in the deed of conveyance thereof made between, &c. This deed referred to was for  $2\frac{1}{2}$  acres, part of lot 23, in the 4th concession, and of lot 23 in the 5th concession, describing the part in each concession separately by metes and bounds, that in the 5th containing less than half an acre.

*Held*, that the mortgage could not be taken to include more than the land in the fifth concession.

EJECTMENT for part of lot No. 23, in the 4th concession of North Norwich, commencing at the south east angle of the said lot No. 23, then south seventy-eight degrees thirty minutes west, three chains and ten links, more or less, to a post planted at the south east angle of land deeded to Enock Hilliker; thence north eleven degrees and thirty minutes west, six chains and twenty links to a post planted; thence north seventy-eight degrees thirty minutes east, three chains ten links, more or less, to the limit between lots 22 and 23; then south eleven degrees thirty minutes east, six chains and twenty links, more or less, to the place of beginning.

The defendants, by an order of *Hagarty, J.*, were admitted on the 19th day of January, 1861, to defend as landlords of Henry Henderson sued in this action, for all the premises mentioned in the declaration.

The plaintiff claimed possession under a mortgage, bearing date the 27th day of August, 1856, made by Joseph Lawson and Lydia Lawson his wife to Colin Campbell Ferrie, John Ferrie, and Robert Ferrie, and their heirs and assigns for ever.

The defendants denied the title of the plaintiff, and claimed title in themselves under an indenture by way of mortgage, dated the 6th of March, 1856, made by Joseph Lawson and Lydia Lawson to them, the said John Wright and Joel Tomlinson Wright, to hold to them and their heirs and assigns for ever.

The trial took place at Woodstock, before *Draper, C. J.*

A mortgage from Joseph Lawson and wife to the plaintiff and other parties (since dead) bearing date the 27th of August, 1856, for  $2\frac{1}{2}$  acres of land, more or less, being part of lot No. 23 in the 4th concession, and part of lot No. 23 in the 5th concession of North Norwich, was put in by the plaintiff's counsel. The description of the premises in the 4th concession, for which this action was brought, was the same as in the writ.

Both parties claiming under Lawson, the plaintiff did not give any further testimony.

For the defence a deed was then put in from David McAulay and wife to Joseph Lawson, bearing date the eleventh day of December, 1854, for  $2\frac{1}{2}$  acres of land in the township of Norwich, being composed of part of lot No. 23, in the 4th concession, and a part of lot No. 23, in the 5th concession, both of Norwich aforesaid, which parcels of land may be better known and described as follows &c. :—the description of the premises in the 4th concession being precisely the same as that contained in the plaintiff's mortgage and in the summons, and the description of the land in the 5th concession being also given by metes and bounds.

A mortgage was also put in, dated 6th March, 1856, from Jos. W. Lawson and wife to John Wright and Joel T. Wright, of West Oxford, for £105, of "all those certain parcels or tracts of land and premises situate, lying and being in the Township of Norwich, containing by admeasurement two acres and a half, more or less, being composed of part of lot No. 23, in the 5th concession of the said township of Norwich, particularly described in the deed of conveyance thereof bearing date the 11th of December, 1854, and made between one David McAulay, of the township of Norwich aforesaid, of the first part, Elizabeth McAulay, of the same place, of the second part, and the said party of the first part hereto (Joseph Lawson) of the third part." This mortgage was also registered on the 6th of March, 1856, the same day as the deed from McAulay and wife to Lawson, for the premises in the 4th and 5th concessions particularly described in that deed.

It was admitted that the land mentioned in the deed from McAulay and wife to Lawson as part of No. 23 in the



5th concession contained only between a quarter and half an acre, the part contained in the deed to Lawson and in Lawson's mortgage to the plaintiff as part of lot No. 23, in the 4th concession, exceeding two acres, the two parcels thus containing  $2\frac{1}{2}$  acres.

The question was, whether the mortgage to defendants could be held to cover the land forming part of No. 23, in the 4th concession, and sought to be recovered.

The learned Chief Justice directed a verdict to be entered for the plaintiff, reserving leave to the defendants to move to enter a verdict for them.

*Richards*, Q. C., obtained a rule calling upon the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a verdict entered for the defendants, pursuant to leave reserved, or why a new trial should not be had, the verdict being contrary to law and evidence, on the grounds and objections taken at the trial, and on the ground that the mortgage on which the defendants claimed title conveyed to the defendants all the land sought to be recovered in this cause, and entitled them to the possession thereof. He cited *Carman v. Molson*, 5 C. P. 125; *Doe Murray v. Smith*, 5 U. C. R. 225; *Doe Notman v. McDonald*, 5 U. C. R. 321; *Jamieson et al. v. McCollum*, 18 U. C. R. 445; *Henderson v. Harris*, 10 C. P. 374; *McDonald v. McPhail*, 17 U. C. R. 299; *Cartwright v. Detlor*, 19 U. C. R. 210.

*Crombie* shewed cause, and cited *Tay. Ev. sec. 1105*.

**McLEAN, J.**—The plaintiff seeks to recover the part of lot No. 23, in the 4th concession described in his mortgage, and the defendants claim that they have a prior right to the possession, their mortgage being of a prior date, and as they contend containing all the land,  $2\frac{1}{2}$  acres, mentioned in the deed from McAulay to Lawson, though stated in their mortgage as being in the 5th concession. The defendants' mortgage bears date and was recorded on the 6th of March, 1856, the same day on which the deed from McAulay and wife to Lawson was recorded, so that the

parties had Lawson's deed containing the boundaries of the land on which security was to be given if they chose to refer to it. The strong probability is, that the mortgage was intended to cover the whole  $2\frac{1}{2}$  acres contained in Lawson's deed, and not merely the small part in the 5th concession. The description is of all those certain *parcels* or *tracts* of land and premises (professing to convey and assign more than one tract of land) containing by admeasurement *two acres and one half*, be the same more or less, being *composed* of part of lot No. 23, in the *5th concession* of the township of Norwich, *particularly described* in the deed thereof from David McAulay and Elizabeth McAulay to the party of the third part in the mortgage bearing date the 11th day of December, 1854. Though it purports to convey more than one parcel of land, and states the quantity conveyed at two acres and a half, the description points only to the parcel in the *5th* concession of Norwich, which is described in the deed to Lawson from McAulay and wife. There are premises in the 4th concession particularly described in the same deed, but these are apparently excluded by the description in defendants' mortgage, being confined to the land in the 5th concession.

I do not see any thing which can justify the conclusion that the land in the two concessions was intended to be included in defendants' mortgage, except that the description professes to grant certain *parcels* or *tracts* of land, and that the quantity specified is greater than in the parcel in the 5th concession, which is admitted to contain a quarter or half an acre at most.

Under these circumstances it appears to me that we would not be justified in considering the description as applying to the two parcels of land in Lawson's deed, when his mortgage points out the land as being particularly described in that deed as part of lot No. 23, in the 5th concession. If we were to take upon ourselves to extend the operation of the description in defendants' mortgage to the land in both concessions stated in the deed from McAulay and wife to Lawson, because we see on the face of it some things which may lead to the belief that the parties intended it to be so, we

might be depriving the plaintiff of a security which he took in full confidence that it was not subject to any prior incumbrance. If the registry had been searched previous to the plaintiff's mortgage being taken, he would have found that though Lawson had given a mortgage of a prior date to the defendants, it was only on the land mentioned in the deed from McAulay to him in the 5th concession, and confined expressly to the description given of that small tract. The mistake, if there is one, is that of the defendants or their agent in preparing the mortgage, and it seems to me that we cannot run the risk of an injustice to the plaintiff because we may suppose there is such mistake. Under these circumstances I think the defendants' rule must be discharged with costs, and the plaintiff's verdict must stand.

BURNS, J.—This case is not like any of the cases cited in the argument. If we could see that it clearly was the intention of the grantor, Lawson, to convey to the Wrights all the land which was mentioned in the conveyance to himself from McAulay, and that such intention was manifest on the face of the deed, then we might apply the doctrine that a *falsa demonstratio* would not frustrate the intention. There is no *falsa demonstratio* here, for the mortgage under which the Wrights claim in effect does particularly describe the part of 23 in the 5th concession, by referring to the conveyance made by McAulay to Lawson. When we refer to that we find that part of 23 in the 5th concession is particularly described by metes and bounds, and in addition to that also part of 23 in the 4th concession is particularly described by itself.

The defendants' argument is in effect this, that the difficulty is not in controlling the intention by a false description, but that it is to enlarge the intention of the grantor; and that the expressions "those parcels or tracts of land," and "containing by admeasurement two acres and a half," shew, when taken with a reference to McAulay's deed, that the grantor intended to convey both pieces of land therein mentioned. With respect to the last expression, it is accom-



panied by the expression of "more or less," and therefore of itself could never be carried to extend into another concession not mentioned, or out of the lot and concession particularly mentioned, and the piece of land of that lot particularly described. With respect to the expression "*those parcels or tracts of land*," although it would indicate an idea that upon reading further on in the deed one would expect to find more than one parcel mentioned, yet there is not the slightest thing to guide what land it would refer to. To say that it must be the land mentioned in McAulay's deed would be a latitude of construction not at all allowable. It is only to find the description of part of 23 in the 5th concession that McAulay's deed is referred to.

I see the deed of mortgage to the defendants is to secure the payment of £105, and the parties may have been content with the small piece of ground to secure that, while the plaintiff's mortgage is to secure £200, and *quoad* the piece of land described in the defendants' deed is a second mortgage.

The rule should be discharged.

The CHIEF JUSTICE having been absent during the argument, gave no judgment.

Rule discharged.

### TODD V. PERRY, WATT, AND WALKER.

*Collector's bond—Action against sureties—Form of bond—Delay in delivery of roll—Extension of time for collection—Power of arbitrator under reference at nisi prius.*

In an action on a bond given to T., the plaintiff, describing him as treasurer of the municipality of Fergus, for the performance by defendant P. of his duties as collector.

*Held*, 1. That the neglect of the clerk to deliver to P. the roll before the 1st of October, as directed by 16 Vic., ch. 182, sec. 39, formed no defence for the sureties.

2. That they were not relieved by the extension of time for collection of the rates allowed by the council to P.

3. Affirming *Judd v. Read*, 6 C. P. 372—that the action might be maintained by the plaintiff as treasurer, though the statute directs that the bond shall be taken to the municipality.

The case was referred at *nisi prius*, with the same power to the arbitrator as the judge had to amend the pleadings, and under this he allowed pleas to be added raising the first and second questions above mentioned, which he referred to the court, with the last.

Per *McLean, J.*, the last objection should not have been allowed by the arbitrator.

This action was brought by the plaintiff, as treasurer of the

municipality of the village of Fergus, against the defendants, on their bond bearing date the 28th day of April, 1858, whereby they acknowledged themselves to be held and firmly bound to "Gilbert Heriot Todd," the plaintiff, "treasurer of the municipality of Fergus, in the county of Wellington," in the sum of £1000, subject to certain conditions thereunder written, that if the said James Perry should collect all rates and assessments of the village of Fergus for the year 1858, for which he had been appointed collector, and should pay over or cause to be paid over all moneys which he should collect to the treasurer of the said municipality of the village of Fergus, on or before the 14th day of December, 1858, then that the said obligation should be null and void, otherwise to remain in full force and virtue.

The breaches assigned were, 1st. That the said James Perry did not collect as such collector of the municipality of Fergus, for the year 1858, but neglected to do so as to a large amount, to wit, to the amount of £500, which he might have collected, but which still remained uncollected. 2nd. That the said James Perry, as such collector, collected and received divers large sums of money, to wit, to the amount of £500, but had never paid over the same, or any part thereof, though often requested to do so, and had wrongfully misappropriated the same. By reason of which several breaches the said writing obligatory became forfeited, and thereby an action had accrued to the plaintiff to demand and have of the said defendants the said sum of £1000.

*Pleas*, by defendants, 1. That before the commencement of this action all the rates and assessments of the municipality of the village of Fergus for the year 1858 that could be collected were collected and paid over to the plaintiff, as treasurer of such municipality.

At the last autumn assizes for the county of Wellington, held at Guelph, on the 13th day of November last, this cause and matters in difference therein, were by order of the court, with the consent of the parties, referred to Archibald McDonald, Esquire, judge of the county court of the county of Wellington, with the same powers as to certifying and amending the pleadings and proceedings and otherwise as at *nisi prius*.

During the reference, pursuant to the power reserved, the arbitrator allowed the defendants John Watt and James Walker to add pleas to the following effect: 1st. That they, the said John Watt and James Walker, signed the bond declared on as sureties for the other defendant, James Perry, that he, the said James Perry, would perform the duties of collector of taxes of the municipality of the village of Fergus, for the year 1858; and that by a certain act of parliament of the province of Canada, entitled "An Act to amend and consolidate the assessment laws of Upper Canada," and passed in the 16th year of the reign of Her Majesty Queen Victoria, chapter 182, which said statute was in full force and effect at the time the bond declared on in this suit was signed, and continued in full force and effect during the whole of the year 1858, amongst other things enacted by the said statute, it is enacted, by section 39, "that it shall be the duty of the clerk of every city, town, village or township, to make out a collector's roll for the township or village, or for each ward in the city or town, as the case may be, \* \* and the clerk shall deliver the roll so made, certified under his hand, to the collector on or before the first day of October, or such other day as may be prescribed by any by-law of the municipality;" and that during the year 1858 there never was any by-law of the said municipality of the village of Fergus prescribing any other day than the first day of October, 1858, on which the clerk of the said municipality should deliver the collector's roll for the said municipality for the said year to the said James Perry, the defendant, so being collector as aforesaid; and that the said plaintiff in this suit was clerk of the said municipality of the said village for the said year, and that the said plaintiff as such clerk did not deliver the collector's roll of the said village of Fergus for the said year to the said defendant, James Perry, such collector as aforesaid for the said year 1858, on or before the first day of October, 1858, as by the said statute he was required to do.

2nd. And for a further plea the defendants John Watt and James Walker further say that they, the said John Watt and James Walker, signed the bond declared on in this case as sureties for the other defendant, James Perry, that he,



the said James Perry, would perform the duties of collector of taxes of the municipality of the village of Fergus for the year 1858, and that the council of the said municipality of the village of Fergus for the years 1858, 1859, and 1860, of which municipality the said plaintiff was treasurer for the said years, extended the time for the said James Perry, the other defendant, to collect the taxes for the said year 1858, beyond the time allowed by law, without the consent of the defendants John Watt and James Walker, the said sureties of the defendant James Perry.

The plaintiff took issue upon all the pleas, and demurred to the second and third pleas allowed by the arbitrator to be pleaded by the defendants John Watt and James Walker. And to the second plea he replied on equitable grounds, that the collector's roll was delivered to the defendant Perry for collection of taxes thereon shortly after the 1st day of October, 1858, and thereupon the said James Perry voluntarily accepted the same, and the charge of collecting the rates and assessments thereon, and might have collected divers large sums of money thereon, which he neglected to collect, as in the declaration mentioned, and did collect and receive other large sums of money thereon, which he did not pay over, as also in the declaration mentioned, of which premises the said John Watt and James Walker had notice, and were consenting and acquiescing in such acceptance of the said roll, and of the charge of collecting the rates and assessments thereon by the said James Perry.

The plaintiff stated certain grounds of demurrer intended to be urged against the second and third pleas; and the defendant John Watt and James Walker joined in the demurrers, and rejoined to the plaintiff's replication on equitable grounds that they, the said Watt and Walker, never consented to or acquiesced in the acceptance of the roll by the other defendant Perry after the 1st day of October, 1858.

On these pleadings, after hearing the evidence, the arbitrator reserved the following questions for the opinion of the court:

1. Can the municipality maintain this action in the plaintiff's name on the bond given to him for the benefit of the

corporation for default made by the collector, no other security having been taken for the performance of his duty?

2. Is the neglect of the clerk in not delivering the roll to the collector until the 7th of October, 1858, a bar to the recovery on the bond against the sureties, the time not having been extended by by-law, the collector having accepted the roll without objection, the sureties not being aware of the delay, and in consequence never having acquiesced, and the delay being in no way a prejudice to the defendants or either of them?

3. Did the resolutions of the council giving an extension of time for the collection of the taxes release the defendants Walker and Watt from their liability on the bond as sureties for Perry, the extension of time being for Perry's benefit, but the sureties not having given any consent?

He found further by his award that the sum of £88 16s. 6½d. had been or could have been collected by the defendant Perry within the time allowed by law for him to levy therefor, and that of this sum £29 10s. 8d. had been collected, but as to the balance he found it impossible to determine how much he did collect, or how much remained unpaid by the rate-payers. And he awarded that in case the issue on the third plea, and the demurrer to the second and third pleas, should be determined in favour of the plaintiff, then judgment should be entered for the plaintiff for the debt, £1000, and £88 16s. 6d., damages on the breaches assigned, unless the court should be of opinion that the sureties ought only to be held responsible for the money collected by Perry and not paid over, and in that case judgment should be entered only for £29 10s. 8d., damages on the first breach.

*N. Kingsmill*, for the plaintiff, cited *Judd v. Read*, 6 C. P. 362; *Wilkes v. Clement* 9. U. C. R. 339; *Cole v. Green*, 6 M. & Gr. 872; *The Trent Navigation Co. v. Harley*, 10 East 35; *Corporation of Whitby v. Harrison*, 18 U. C. R. 606; *Webster v. Macklem*, 4 C. P. 266.

*Richards*, Q. C., contra, cited *Watson v. Allcock*, 4 DeG. McN. & G. 242, S. C. 17 Jur. 568; *Whitcher v. Hall*, 5 B. & C. 269; *Kepp v. Wiggett*, 10 C. B. 35; *Webb v. James*, 7 M. & W. 279; *Pitman on Principal and Surety*, 199.

McLEAN, J.—The arbitrator has stated several questions of law, which he has reserved for the opinion of the court, and upon the judgment which may be given upon these questions he founds his award for or against the plaintiff or defendants according to circumstances. Amongst these questions he has allowed the defendants Watt and Walker, who are alone engaged in the demurrers to the second and third pleas, to take exceptions, not to any thing in the form of the declaration, but to the right of the plaintiff to maintain this action on the bond taken in his favour and executed by the defendants.

No question was in issue upon that point when the suit was referred, and as it is stated by the arbitrator in his award that no other security was taken for the collection of the rates for the year 1858, and by the finding a sum of £88 16s. 6d. is found in arrear, the security of which may wholly depend on the sufficiency of that bond, no injustice could have arisen by the defendants being excluded from grounds of objection which were not taken in the original pleadings, and which would not have been allowed at *nisi prius* merely for the purpose of endeavouring to defeat a just recovery.

As to the second plea, setting forth the delay after the 1st day of October in delivering the roll to the collector, it was bad in substance, for it contained no ground of defence. If the treasurer did not deliver the bond to the collector till a few days too late he omitted a duty required by law, but I cannot conceive that that affords any reason that the defendants should be relieved from their responsibility on their bond after the principal has become a defaulter. Even if the issue intended were clearly raised, it would be quite immaterial, because whether the collector received his roll a day too late or a day too early, could not in any way affect the validity of his bond.

The 41st section of 16 Vic., ch. 182, points out what is the duty of the collector when he does receive his roll, and if the collector of Fergus had paid attention to its directions, he would probably have saved himself trouble and costs, to which he and they are put in this action.



Then as to the second plea demurred to, of the defendants Watt and Walker—that the municipality of Fergus, during the years 1858, 1859, and 1860, extended the time for the collection by the said James Perry of the rates and assessments for the year 1858 beyond the time allowed by law, without the consent of the defendants John Watt and James Walker, the sureties—I cannot see that any ground of defence is set out in that plea. If they did extend the time they had undoubted authority to do so without releasing the defendant Perry and his sureties from their responsibility on their bond for any amount collected or remaining to be collected. The law is not so excessively rigid as to compel a municipality to enforce the collection of rates under all circumstances at a specific day, and it seems to me to be setting forth a singular defence, when sureties urge the indulgence shewn to their principal as a sufficient ground for their being discharged from their obligations in his behalf.

These defendants Watt and Walker have bound themselves for the performance of the duties of collector of the village of Fergus, by James Perry, for the year 1858. If he had done so, there could have been no necessity for an extension of time to enable him to complete his collections, and if they extended the time beyond the limit allowed by law they may have been wrong in having done so, but the error of the council in extending too much indulgence to the collector could not discharge him or his sureties from their obligation for the collection of the rates and assessments of Fergus for the year 1858. The form and the substance of what the defendants offer as a third plea are equally objectionable, and cannot have any weight or validity whatever, though received by the arbitrator under the power which the parties agreed he should exercise.

As to the exception to the action and to the declaration in the name of the plaintiff, I incline to think that such an objection cannot be urged in this stage of the proceedings. The objection is not to the declaration as not sufficient on the bond, but it is in fact to the legality of the bond itself. The declaration is good upon the bond, and when certain issues were referred to the arbitrator he had not any authority

conferred upon him, as it appears to me, to allow any issues to be raised except such as were necessary for the ends of justice in the *case* referred. The exceptions which the arbitrator alleges *two* of the defendants desire to urge to the declaration, in my judgment it is incompetent for them to take. But if such an exception were open to them as sureties, when they are not urged by their principal, we are relieved from all difficulty in the matter by the case decided in the Court of Common Pleas on a similar bond given by the collector to and sued by the treasurer at Belleville. The case is reported in the 6th volume of the Common Pleas Reports, page 362, and I do not feel in the least degree called upon to differ from the law as decided by that case. This action is brought for the benefit of the municipality of Fergus, and under its sanction, by its treasurer. The security sued on is that of the corporation, executed by the defendants for the performance of specific duties, and the defendant Perry having entered into that bond, and collected considerable sums as collector of the village, cannot now be allowed to repudiate his bond, and say that it does not form a good security, because it is taken in the name of the treasurer instead of in the name of the municipality of Fergus, when in fact he does not himself raise the objection on the record.

I am clearly of opinion that the several questions or propositions reserved or proposed in respect of the pleadings by the arbitrator must be found for the plaintiff, and that he is entitled to judgment on the demurrers, as well as upon the whole record.

BURNS, J.—The bond in this case of the defendant Perry and his sureties was given under 16 Vic., ch. 182, sec. 76, which in its phraseology is precisely like that of 13 & 14 Vic., ch. 67. Therefore the case of *Judd v. Read* (6 C. P. 362) applies to the first question put by the arbitrator: namely, whether the action can be maintained in the plaintiff's name. There is this difference between this case and that mentioned. Here the bond is given to this plaintiff, describing him as treasurer of the municipality of the

village of Fergus, and to his successors in office, with a condition to pay over to the treasurer of the municipality all moneys which the defendant Perry, the collector, might collect, whereas in the case cited the bond was to the treasurer and his successors in office, without the name of any person. On the authority of that case and the case cited there we must hold there is nothing in this objection.

The second question raises the point whether the words in the 39th section of ch. 182—namely, “and the clerk shall deliver the roll so made, certified under his hand, to the collector, on or before the first day of October, or such other day as may be prescribed by any by-law of the municipality,”—are only directory, or whether they are a condition precedent to a recovery against all the defendants, or to a recovery against the two who are sureties for the other. The roll in this case was not delivered to the collector, Perry, until the 7th of October, and no by-law was ever passed naming any day for such delivery. I think it impossible to construe the act in any other way than as directory. A day is fixed for the clerk to perform a certain duty, but power given to the council of the corporation to name another day, if such other day would be preferable, and the council might name by a by-law either an earlier or later day than the first of October, if such would be more convenient. It would be, so far as the collector is concerned, a monstrous thing to hold that because the clerk neglected his duty, and delivered the roll a day or two after he was directed to do it to the collector, the collector might collect the year's taxes and then turn round upon the corporation and say he was not the collector, and that he received the taxes under no legal authority, and he should keep the whole money. Surely Perry was as much the collector of the village of Fergus on the 7th of October, the day he received the roll, as he was on the 28th of April, 1858, the day the bond was given, and the sureties bound themselves that Perry should collect all rates and assessments of the village of Fergus for the year 1858, for which Perry had been appointed collector. He was not appointed collector to be such until the roll should be delivered to him, for that



would have been absurd, inasmuch as without the roll he could make no collection at all and he was not appointed conditionally, for the office to be void in case the roll was not delivered on or before the 1st of October, but his appointment was to collect the rates and assessments for the year 1858. The second question should therefore be answered in the plaintiff's favour.

Then with regard to the third. The bond in this case was conditioned that the taxes and assessments should be collected and paid over by the 14th of December. The time for collection being extended is provided for by statute 18 Vic., ch. 21, and that such extension shall not discharge the sureties. We have already held that sureties under such circumstances were not discharged.—See *Corporation of Whitby v. Harrison*, (18 U. C. R. 606.) It is argued in this case that the one extension of time given to the collector absorbs his authority. This court held otherwise in the case of *Newberry v. Stephens et al.* (16 U. C. R. 65.) It is obvious on reflection that the liability of the sureties must be co-extensive with the authority of the collector, unless the corporation do some thing to absolve them. The legislature has enacted that the corporation giving further time to the collector to collect the taxes shall not free the sureties. Then the terms of the bond are, that the collector shall collect the taxes of the year 1858, and if the day mentioned in the condition, which was the 14th of December, by which the taxes were to be collected and paid over, becomes abrogated by resolution of the council of the corporation, then I think the liability of the sureties must be co-extensive with the authority of the collector. The sureties are only liable for the collector's collection and non-collection of the taxes of that year, and the time of collection or non-collection may be regulated by council giving further time. The collector is not restricted by this giving of time, it is only given that he may avail himself of it if he thinks proper. The sureties join him in a bond for the faithful discharge of his office, knowing full well what the law is and was when they entered into the bond. They knew the law had provided for their liability continuing notwithstanding the extension of time given to the collector.

These determinations render it necessary to say that judgment should be given for the plaintiff on the demurrer to the defendants' second plea, and also judgment for the plaintiff on the demurrer to the third plea.

Judgment should therefore be entered for the plaintiff on the whole record for the amount found by the arbitrator, £88 16s. 6d.

The CHIEF JUSTICE having been absent during the argument, gave no judgment.

Judgment for the plaintiff.







# A DIGEST

OF

## ALL THE REPORTED CASES

DECIDED IN

## THE COURT OF QUEEN'S BENCH,

FROM TRINITY TERM 24 VICTORIA, TO  
TRINITY TERM, 25 VICTORIA.

### ABANDONMENT.

*See* INSURANCE, 2.

### ABATEMENT.

*See* SEDUCTION.

### ACTION.

*See* ATTORNEY — COSTS — COVENANTS FOR TITLE — GAS COMPANIES — HARBOUR COMPANIES — INTEREST — MUNICIPAL CORPORATIONS 3. — PARTNERS AND PARTNERSHIP. — RAILWAYS AND R. W. COS. — SEDUCTION. — SHERIFF. — TRESPASS 2, 3.

### ADMISSION.

*See* AGREEMENT, 1.

### ADMINISTRATORS.

*Promissory note—Death of payee in foreign country—Endorsement by his administrators there—Right of endorsee to sue here.]—See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

### AFFIDAVIT

*See* COMMISSION TO EXAMINE WITNESSES.—NEW TRIAL, 4.—QUARTER SESSIONS.

### AGENTS.

*Consol. Stats. C. ch. 92, sec. 44—Meaning of the word “agents,” there.]—See* CRIMINAL LAW, I.

*See* PRINCIPAL AND SURETY, 1.

### AGREEMENT.

1. *Ejectment—Acknowledgment of title—Construction of agreement.]—*Defendant being in possession of certain premises under one M., executed an instrument under seal, by which he agreed to give up peaceable possession to the plaintiffs, together with certain furniture specified, within one week from the date, upon receipt of \$30. On the following day the plaintiffs tendered to him \$30, which he refused, and they then brought ejectment. *Held*, that in the absence of any explanation as to the real nature of the transaction, it was properly left to the

jury as importing an admission by defendant that the plaintiffs were entitled to possession on paying or tendering the \$30. *Stewart and Leslie v. Cameron*, 193.

2. *Construction—Covenant to present papers personally to Ins. Co.*—Defendants by agreement covenanted to pay the plaintiff \$961.35, and by the same agreement it was made a condition that the plaintiff should allow his name to be used in prosecuting a claim in which defendants were interested, against a mutual insurance company: that he would personally present his particulars of loss, with the usual affidavits and certificates required by the company, whenever requested in writing so to do by any of the parties to the agreement; and that if the claim should be defeated by any gross negligence of the plaintiff then this agreement should be void. In an action upon defendants' covenant: *held*, that it was not necessary that the plaintiff should present the necessary papers in person to the company, or on the precise day named by defendants; and that he must be held to have performed the condition upon the evidence set out in the case, which shewed that the papers furnished by him were not objected to, and that the claim was not defeated owing to their insufficiency. *Rice v. Wells et al.*, 404.

3. *Agreement—Construction—Liability for moneys received by purser, and for goods supplied to steamer.*—Defendants entered into an agreement to advance money to the plaintiffs to enable them to procure a steamer which was to run in connexion with defendants' railway, and guaranteed them against loss up to a specified sum. The earnings of the vessel were to be shared as provided for; and it was agreed that defendants should name and

pay a person to act as purser, and keep an account of the receipts and expenditure. He was to be subject to their authority, and to mess with the captain at the plaintiffs' expense. *Held*, that the defendants were not liable to account to the plaintiffs for moneys received by him and not paid over.

The plaintiffs also claimed for goods supplied to another steamer, but it was shewn that this vessel was chartered to one W., who ran her on his own account, of which the plaintiffs had notice. *Held*, that they could not recover. *Vanevery et al. v. The Buffalo and Lake Huron Railway Company*, 630.

See ARBITRATION AND AWARD, 1.—INSURANCE.—MUNICIPAL CORPORATIONS, 3.—OFFICES (SALE OF).—PRINCIPAL AND SURETY, 3.—RAILWAYS AND RAILWAY COS., 1, 2.—SALE OF GOODS.

## ALIEN.

*Right of to devise.*—See FORFEITED ESTATES.

## AMENDMENT.

*Trespas.*—*Held*, that under the circumstances stated in the case, in an action for seizing two horses, the judge was justified in allowing a waggon and set of harness to be inserted also in the declaration at the trial, the defendant's counsel objecting, but admitting that he was not taken by surprise by such amendment. *Sage v. Callaghan*, 266.

See APPEAL 2.—PARTNERS AND PARTNERSHIP.

## APPEAL.

1. *Action for maliciously suing out attachment—Plea, appeal in the suit still pending.*—*Declaration*, for maliciously causing a steamer of the plaintiffs to be attached in the United States to answer a pretended

claim of the defendant, alleging that the suit in respect of said claim had been determined in favour of the plaintiff. *Plea*, that before the commencement of this suit defendant appealed from the decision against his claim, which appeal was still pending. *Held*, on demurrer, plea good. *Griffith et al. Executors of Thompson v. Ward*, 31.

2. *Appeal from county court—Application to amend judgment—Delay.*—On appeal from a county court this court reversed the judgment below, discharging a rule *nisi* to enter a verdict for defendant, which appeared by the appeal books to have issued, and made absolute that rule. Six terms afterwards the plaintiff moved to amend the judgment by granting a new trial, on affidavits that no leave was reserved in the court below to enter a verdict for defendant; but this court refused to interfere. *Robinson v. Grange*, 270.

3. *County court—Right of Appeal—Omission to give bond in time.*—Where in the county court a verdict is taken for the plaintiff, with leave reserved to move to enter it for defendant, an appeal will lie from the judgment on such motion. This court will not refuse to hear an appeal properly entered, because the necessary bond was not given in time. *Haworth and Kesteven v. Fletcher*, 278.

4. *Appeal—Application to stay proceedings.*—The defendants having succeeded in replevin brought against them for a schooner, the plaintiff served notice of appeal, and applied to stay proceedings for a month to perfect his security, so that the defendants might not in the meantime obtain a return of the vessel. The court, however, refused to interfere. *Scott v. Carveth et al.*, 435.

See DEMURRER.

## ARBITRATION AND AWARD.

1. *Award—Construction—Pleading.*—An award made in March, 1860, directed that defendants should pay the plaintiff one-fifth of all the expenses that might be incurred by him after the 1st of October then next, for the mutual benefit of the plaintiff and defendants, in repairing a certain water-wheel, flume, bulkhead, &c., the plaintiff to have the right to say what repairs should be done: that the plaintiff should render to defendants monthly accounts, properly vouched for, of the expense of such repairs, and within one month from the time of rendering the same defendants should pay one-fifth of the amount thereof to the plaintiff; and it was further awarded, that should it be deemed necessary to put in a new wheel, &c., before the 1st of October then next, defendants should pay one-fifth of the expense incurred therein, on an account for the same being rendered to defendants, and vouched for, as before stated in said award for the proportion of future repairs. *Held*, affirming the judgment of the county court, that defendants were bound to pay *monthly* for the expense of a new wheel, in the same manner as for the other repairs: that the plaintiff had the right to judge of the necessity therefor; and that in declaring upon the award it was sufficient to aver that it was deemed necessary, and that the plaintiff proceeded to put it in, as by the award he might do. *Abbott v. Skinner et al.*, 414.

2. *Award—Construction—Finality—Pleading—Allowance of interest.*—Under a submission of all matters in difference between the plaintiff and defendant, (not specifying any subject of dispute,) with power to the arbitrators to determine what they should see fit to be done by



either, the arbitrators by their award—after reciting that one G., by a writing endorsed on the submission, had agreed to submit to them a charge of £250 per annum, made by defendant for the management of certain property in Berlin, in which G. and the plaintiff were jointly interested—found that on the 1st of September, 1860, defendant was indebted to the plaintiff in £3249 17s. 8d., which they ordered him to pay accordingly, with interest half-yearly until paid. 2nd. As to the Berlin property, that as regarded the rights and liabilities of the plaintiff and defendant there-to, they did not find that any difference had arisen calling for their arbitrament, (further than as might regard the said amount claimed for management,) and they therefore made no adjudication on such rights or liabilities. 3rd. As to certain property in Guelph, comprised in a deed made by defendant to plaintiff, they adjudged that the plaintiff should hold the same in fee by virtue of such deed, but that if he, or his heirs or assigns, should sell the same, or any part thereof, and should realize from such sale a larger sum than £1105, he or they should account for such surplus to the defendant, his executors, &c.

To an action on this award, defendant, after setting it out at length, pleaded: 1. That the arbitrators awarded upon matters not submitted, and which accrued after the submission, and upon accounts between the parties to a period long after the submission. 2. That the award was not final, in this, that the said matters relating to the Berlin property were matters in difference, and were submitted to the arbitrators, but that they did not award thereon; and in this, that they did not dispose of the difference respecting the value of the Guelph prop-

erty, but left the same unsettled and dependent upon the sale thereof by the plaintiff, when only the amount to be accounted for to defendant could be determined. *Held*, on demurrer, both pleas good; and as to the second plea, that the averment as to the Berlin property was a sufficient defence, and the plea therefore sufficient, although the award as to the Guelph land was not wanting in finality.

At the trial, upon issue taken on the first plea, it appeared that the plaintiff in April gave in a statement of his claim, calculated with interest up to that time, at twelve per cent., which had been the usual rate allowed in the dealings between the parties. At the defendant's request time was allowed him to prove his defence; and in making their award on the 6th of October, the arbitrators added interest at the same rate up to the 1st of September, on the sum claimed in April for principal and interest up to that time. *Held*, that they had power to do this, and to award interest on the amount until paid. *Held*, also, that upon the evidence set out in the case, the first plea was not proved. *Quære*, as to the intention and effect of the direction in the award to pay the £3249, and interest half-yearly until payment. *Stewart v. Webster*, 469.

3. *Compulsory reference—Time for moving—Statement of questions for the court—Building contract—Departure from its terms.*—On a compulsory reference a motion to refer back the award may be made within the first six days of the term following its publication.

Where the reference was "with power to the arbitrator, if either party requires it," to submit questions of law for the decision of the court. *Held*, an enabling provision only, not compulsory.

An action upon a building contract having been thus referred, the plaintiffs contended that the defendants had broken the agreement so as to put an end to it, and that they (the plaintiffs) were therefore not bound by its terms, and they requested that if the arbitrators should not so determine they would certify the facts for the court. The defendants requested that if the award should be against them the arbitrators would certify to the court whether the contract bound the parties, and whether the engineer's certificate was final. The award was in favour of the plaintiffs, and one of the arbitrators, in compliance with the defendants' request, certified, without submitting any question, that the contract was binding, and the engineer's certificate conclusive, and that the award had been based on that assumption. The plaintiffs afterwards moved to refer back the award with a direction that the contract did not bind, or to refer back the certificate for amendment, by stating the facts; but *held*, that as the arbitrators had not chosen to submit any point for decision, and were not bound to do so, the court could not interfere.

Remarks as to the circumstances under which a building contract is or is not rendered inoperative by departure from its terms. *Kesteven et al. v. Gooderham et al.*, 500.

4. *Remitting matters back*—*C. L. P. A.*, sec. 164.]—The effect of the *C. L. P. A.*, sec. 164, enabling the court to remit matters back to the arbitrator, is not to alter in any way his power or authority, and the court therefore refused to interfere upon an objection not apparent on the face of the award, that in considering the nature of the work claimed for as rock or stone excavation he had not conformed to the en-

gineer's certificate, which it was contended bound the plaintiff. *Read v. Weir*, 544.

5. *Compulsory reference*—*Setting aside*]—The rules as to setting aside awards are unchanged by the Common Law Procedure Act, and are the same with respect to compulsory references as to others. The court therefore refused in this case to interfere on affidavits tending to shew that the arbitrator was mistaken as to the law and fact. *Saulter v. Carruthers*, 560.

6. *Joint and several promissory notes*—*Arbitration as to one maker*—*Pleading*.]—In an action against the makers of a joint and several note payable to R. or bearer, one defendant allowed judgment to go by default, and the other pleaded, that after the note fell due, and while it was in R.'s hands, certain disputes arose between R. and this defendant respecting this note among other matters which were submitted to arbitration: that the arbitrators awarded that the defendant should pay R. a sum named, and that he and R. should execute mutual releases; and that the plaintiff took the note after it fell due, with notice of the facts. At the trial the submission and award were proved, and that the plaintiff was present at the arbitration: that the note was disallowed to R., because this defendant, being a surety only for the other maker, had been discharged by giving time; and that the plaintiff then stated that he had no claim upon the note. *Held*, that the note being several, the plea was good, though the action was against two defendants, and the award related to one only: that it was unnecessary to aver performance of the award; and that defendant was entitled to a verdict. *Folwell v. Hyde and Caslor*, 565.

See MUNICIPAL CORPORATIONS, 2—  
RAILWAYS AND R. W. COS., 8—  
SET-OFF.

### ARREST.

See FALSE IMPRISONMENT—RAIL-  
WAYS AND R. W. COS. 6.

### ARTICLED CLERK.

*Service—Expiration of articles less than fourteen days before term.*]—The time of a clerk articulated after the 1st of July, 1858, must expire fourteen days before the term in which he seeks to be admitted, for the affidavit of due service cannot be accepted at a later period, though before his examination. Where M., therefore, entered into articles for a year on the 25th of January, 1860, and Hilary Term began on the 4th of February, 1861, held, that he could not be admitted in that term. *In the matter of Frederick Stewart MacGachen, applying to be admitted as an attorney and solicitor, 321.*

### ASHBURTON TREATY.

See EXTRADITION.—FALSE IMPRISONMENT, 2.

### ASSAULT.

See CRIMINAL LAW, 4.—QUARTER SESSIONS.—RAILWAYS AND R. W. COS., 6.

### ASSESSMENT.

See PRINCIPAL AND SURETY, 4.

### ASSIGNMENT.

*Bond to the limits—Death of sheriff—Right of his successor to assign.*]—See BOND TO THE LIMITS.

*Assignee of part of the land may sue on covenant for seisin.*]—See COVENANTS FOR TITLE.

*Devisees of mortgagor are assignees of the mortgage, as regards the purchase of equity of redemption under 12 Vic., ch. 73.*]—See MORTGAGE, 1.

*Covenant on mortgage given for purchase money—Equitable plea, title defective owing to prior mortgage—Replication assignment of such mortgage.*]—See MORTGAGE, 2, 3.

See DESCRIPTION OF GOODS.

### ASSURANCE.

See INSURANCE.

### ATTACHMENT.

See MANDAMUS, 1.

### ATTORNEY.

*Action for costs—General issue—Defence of negligence admissible, but not sustained by evidence.*]—In an action by an attorney for his costs, negligence may be set up as a defence under the general issue.

In this case the attorney brought an action for the defendant against one M., which was entered for trial in October, 1855. The assizes began on Tuesday, and the attorney sent subpœnas to the defendant for his witnesses on Saturday. A friend of defendant called on the attorney on Monday, and told him that the subpœnas would not reach the defendant until Wednesday, and asked for other subpœnas which he said he would serve himself and bring in the witnesses, but the attorney would not give them. The witnesses did not appear, and the cause was put off, this defendant paying costs. It was brought to trial in April following, and the plaintiff, the now defendant, got a verdict for \$387 10. M. obtained a rule nisi for a new trial on affidavits, but the papers were mislaid, through no



fault of the plaintiff's attorney, for nearly two years, and in Easter Term, 1858, the case was argued, and a new trial granted on payment of costs. M. did not serve his rule until November, 1858, and the costs not having been paid, the attorney in March, 1859, entered judgment, and issued a *fi. fa.*, which was returned *nulla bona*, M. having sold his property and left the country in October previous. In an action by the attorney for his costs, the jury having found for defendant, *held*, that the evidence did not support the verdict, for the defendant had obtained a judgment against M., which might yet produce the debt, and it could not be said that the plaintiff's services had by his negligence become wholly worthless to defendant. A new trial was therefore granted.

*Semble*, that if defendant had lost all benefit from his action by its not having been tried in 1855. the court would not have interfered, for the attorney, in refusing to issue new subpoenas on the Monday, might be considered to have taken upon himself the risk of consequences. *Vidal v. Donald*, 507.

See ARTICLED CLERK—PRINCIPAL AND SURETY, 1.

## AWARD.

See ARBITRATION AND AWARD.

## BAIL.

See BOND TO THE LIMITS.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note—Verbal agreement—Devise.*—To an action by the executors of V., on a promissory note payable to him or bearer, defendant set up as a defence, that by his last will V. devised to each of

his children, of whom defendant's wife was one, £250, to be paid by his executors as soon as possible; and declared that in case he should advance money during his life-time to any of his children on account of such legacies, a receipt therefor should be sufficient as payment of so much on account of the sum bequeathed: that on the 4th of April, 1856, the testator advanced to defendant £100 on account of the sum devised to his wife, and defendant then delivered to him the note sued on as evidence of such advance, it being agreed between them that defendant should not be called upon to pay said note, but that it should be held as a receipt for so much of the legacy; and defendant alleged that he had always been willing, and had offered to sign a receipt for that sum. The will when produced was in the terms alleged, but a codicil was added, made after the note, directing that none of the legacies should be paid until the completion of payments on certain lands due by his son. *Held*, that the plaintiff must recover, for verbal evidence could not be received of such an agreement as alleged, and the statement of the will in defendant's plea was incorrect. *Street et al., Executors of Vyse v. Beckwith*, 9.

2. *Promissory note—Death of payee in foreign country—Endorsement by his administrators there—Right of endorsee to sue here.*—Where a note was made by defendant, a resident of Upper Canada, payable to P., who died in the State of New York, having the note then in his possession there: *Held*, that his administrators appointed in that state might endorse the note so as to enable the endorsee to sue upon it in this country, without their having administered here.

Declaration on a promissory

note made by defendant, payable to P. or order, on demand, averring the death of P., and that J. P. and C. P. were duly appointed his administrators, and duly endorsed to the plaintiff: that when the note was made, and from thence until his death, P. resided in the State of New York: that the plaintiff, at the time of the endorsement to him, and from thence hitherto, lived there also; and that at the death of said P. the note was in the said state. *Plea*, that the note was made at Kingston in the united counties of F. L. & A., in Upper Canada: that defendant at the death of said P., and before and at the time of the making of said note had, and still has his domicile there: that said note at the death of said P. was *bona notabilia* in said united counties: that said appointment of J. P. and C. P. as administrators was made only by a tribunal of said state, and that they were never appointed by the proper authority in Upper Canada. *Held*, on demurrer, that the plea shewed no defence. *Hard v. Palmer*, 208.

3. *Promissory note—Action by executors—Acceptance of order on one—Satisfaction.*—A. being sued upon a promissory note by the executors of W., as bearers, pleaded that F., the acting executor, being the holder of the note, accepted an order drawn by one D. on him, in favour of M., for £50, and that M. being the defendant's agent, it was agreed between F. and M. that the note should be paid out of the £50, and F. thereupon cancelled said note. The evidence shewed that defendant went with the order to F., which F. said he would accept, and pay the note out of it, but there was no acceptance in writing, the note was not given up, and the order was obtained again some months after

by M.'s executor. *Held*, that the plaintiffs were entitled to recover, and that a verdict found for defendant must be set aside. *Williams et al., executors of J. T. Williams, v. Marshall*, 230.

4. *Promissory note—Lottery—Pleading.*—Declaration on a promissory note for £15, payable to G., or bearer. *Pleas*.—1. That before the making of said note, G. did corruptly and against the statute hold a lottery of land, and did sell and dispose of the tickets for £15 each, and that the defendant purchased one, for which this note was given. 2. Alleging the same facts, and adding, that the plaintiffs when they took the note had notice and knowledge of the premises, and became the bearers of it after it fell due, without consideration, and always held and now hold the same without consideration. 3. That the note was given for a certain parcel of land, which was won by unlawfully gaming and playing, contrary to the statute. 4. That defendant was induced to make the note by the fraud of said G. and others, and that the plaintiffs took it after it became due, without consideration, and with full knowledge of the premises. *Held*, on demurrer, first and third pleas bad, second and fourth pleas good. *Evans et al. v. Morley*, 236

5. *Joint note—Mortgage by one maker—Merger—Pleading.*—To an action on a joint promissory note made by M. and K., each pleaded separately that after the note fell due, M., by indenture, covenanted with the plaintiff to pay him \$319, (a sum less by \$2 80 than the amount of the note,) with interest at 15 per cent., in one year, and delivered said indenture to the plaintiff, who accepted it; and that the money mentioned in the declara-

tion and in the indenture was the same. *Held*, on demurrer, pleas good, though the indenture was not alleged to have been accepted in satisfaction, and the sum secured by it was less than the note. *McLeod v. McKay and Kennedy*, 258.

6. *Promissory notes—Exchange on New York—Guarantee.*—In an action on instruments promising to pay money, "with exchange on New York," *McLean*, J., concurred in the decision of the Common Pleas in *Palmer v. Fahnestock*, 9 C. P. 172, that they were not promissory notes. *Robinson*, C. J., and *Burns*, J., expressed no opinion on the point, the plaintiffs not having declared upon them as notes.

The defendant endorsed notes in the above form for the accommodation of the maker, who was in business as a druggist, without knowing how they were to be applied, and the maker transferred them to the plaintiffs for goods purchased from them. Defendant not being liable upon them as notes.—*Held*, that there was clearly no right of action against him as upon a guarantee. *Fahnestock et al. v. Palmer*, 307.

7. *Promissory note payable in L. C.—12 Vic., ch. 22—Construction of—Limitation of action.*—To an action on a note made by defendant, payable to A. H., and by him endorsed to the plaintiffs, defendant pleaded that it was made in Lower Canada, where he resided, payable in Montreal, and that the suit was not brought within five years after it fell due. The plaintiffs replied, that when the note was made and endorsed to them, A. H. lived in Upper Canada, and at the time of said endorsement one plaintiff lived in Upper Canada, and the other in the United States. Defendant rejoined that after the note fell due, while A. H. held it, and more than

five years before suit, A. H. carried on business in Lower Canada, that he and defendant met at Montreal, and A. H. might then have sued him. *Held*, on demurrer to the rejoinder, that by the 12 Vic., ch. 22, the note, owing to the lapse of time, must be taken to be absolutely paid and discharged; and that the plaintiffs could not recover. *Hervey et al. v. Jacques*, 366.

See ARBITRATION AND AWARD, 6.—  
INTEREST.—PARTNERS AND PARTNERSHIP.

## BLANKS.

*Filling up blanks in deed—Effect of*—See DEED.

## BOND.

See EJECTMENT, 1.—EQUITABLE PLEADINGS, 1.—NEW TRIAL, 3.—PRINCIPAL AND SURETY, 3.

## BOND TO THE LIMITS.

*Death of sheriff—Right of his successor to assign.*—The plaintiff declared, as assignee of C., the sheriff of Middlesex, on a bail bond to the limits given to H., the late sheriff, alleging that after the making of the bond H. died, and that the defendant on several occasions departed from the limits; but it was not stated whether the departure took place before or after the death of H., or the appointment of G., or whether the bond had been allowed. *Held*, (affirming the judgment of the county court,) that the declaration was bad, as for all that appeared the departure might have been at such a time as to render the late sheriff liable, and if so his successor could not assign the bond. *Osborne, assignee of the sheriff of Middlesex, v. Cornish et al.*, 47.



## BREACH OF TRUST.

See CRIMINAL LAW, 1.

## BRIDGE.

*Mandamus to repair.*]—See MANDAMUS, 2.

BUFFALO AND LAKE HURON  
R. W. CO.

See RAILWAYS AND R. W. COS. 8.

## BY-LAW.

See MUNICIPAL CORPORATIONS, 1, 4.

## CARRIERS.

See RAILWAYS AND R. W. COS., 1.

## CHATTEL MORTGAGES.

See SALE OF GOODS, 1.

## COLLECTOR.

*Of customs—Transfer of to different ports—Effect of on liability of his sureties.*]—See CUSTOMS, 1.

*Of taxes—Action against his sureties.*]—See PRINCIPAL AND SURETY, 4.

## COLLISION.

See RAILWAYS AND R. W. COS., 2, 3, 5, 7.

COMMISSION TO EXAMINE  
WITNESSES.

*Affidavit of execution.*]—A commission to take evidence issued to one G., of the city of Hartford, in the United States, to take the evidence of one S of the said city. It was returned with an affidavit by the commissioner of due execution, sworn at Hartford before the mayor of that city, but there was nothing in the affidavit to shew that the witness was examined there. *Held*, sufficient. *Quære*, whether it is essential that the affidavit shall be sworn before the mayor, &c., of the place where the evidence is taken. *Stebbins v. Anderson*, 239.

COMMISSIONERS OF FOR-  
FEITED ESTATES.

See FORFEITED ESTATES.

## COMMITTEE.

*Liability of committee for building gail, for supplies ordered for entertainment at laying corner stone*]—See MUNICIPAL CORPORATIONS, 3.

COMMON LAW PROCEDURE  
ACT.

See AMENDMENT.—ARBITRATION AND AWARD, 3, 4, 5.—EQUITABLE PLEADINGS—MORTGAGE, 2, 3 — PARTNERS AND PARTNERSHIP.

## COMMON SCHOOLS.

1. *Rate for school purposes—Mandamus—Consol. Stats. U. C., ch. 64, sec. 79.*]—A mandamus was granted to compel a city council to levy the sum required for school purposes for the year, according to the estimate furnished to them by the school trustees.

It appeared in this case that the corporation having received the estimate did not object to it, but passed a by-law to provide the sum required, which they afterwards repealed, and substituted another, imposing a smaller and insufficient rate; and no reason was given for refusing to provide the sum called for. *The School Trustees of the City of Toronto v. The Corporation of the City of Toronto*, 302.

2 *By law to levy rate for school-house—Extrinsic objections—Refusal to quash—How the desire of rate-payers must be expressed—Consol. Stats. U. C., ch. 64, sec. 34, sec. 27, sub-sec. 10.*]—The township council, by resolution, agreed to lend to the school trustees, out of the clergy

reserve fund, a sufficient sum to build a school-house, taking as security their debentures. This arrangement was made by the trustees without any reference to the rate-payers, but at the next annual school meeting, at which the applicant was present, the matter was discussed, and the contract and plans for the building examined. The council subsequently, on the requisition of the trustees, passed a by-law to raise a sum for school purposes, which was required to pay the interest of these debentures and redeem one of them. The applicant moved to quash this by-law, objecting that the loan effected by the trustees without the consent of the rate-payers was illegal; but it appeared that the school-house had been finished and occupied, many of the ratepayers swore that they were satisfied with what had been done, and the affidavits were contradictory as to how far the applicant had acquiesced in the proceedings. The by-law not being illegal on the face of it, the court under these circumstances refused to interfere.

*Quære*, whether under the Consol. Stats. U. C., ch. 64, sec. 27, sub-sec. 10, and sec. 34, the concurrence of the freeholders and householders required to enable the trustees to call upon the council to levy money for the purchase of a school site, &c., can be expressed at the annual school meeting, without notice that the question will then be brought up. *In the matter of Taber and the Corporation of the Township of Scarborough*, 549.

See MANDAMUS, 1.

## CONDITION.

See COVENANT, 2.—INSURANCE, 1.

## CONDUCTOR.

See RAILWAYS AND R. W. Cos. 1, 6.

## CONSIDERATION.

See DEED.—EQUITABLE PLEADINGS, 1.—PRINCIPAL AND SURETY, 1.

## CONSTABLE.

See FALSE IMPRISONMENT.

## CONTRACT.

See AGREEMENT.

## CONVEYANCE.

See DEED.

## CORPORATIONS.

See GAS COMPANIES.—HARBOUR COMPANIES.—MUNICIPAL CORPORATIONS.

## COSTS.

*Sale of goods—Action for deceit as to title—Right to recover costs of suit brought by purchaser* ]—Defendants sold to the plaintiff and received the purchase money for some wheat, which they represented to be their own, but which belonged to one B., who obtained it from the railway company in whose cars it was. The plaintiff sued the company for delivering it to B., and the action was referred and decided against him, defendants being present at the arbitration, but it was not shewn that they were otherwise concerned in the suit. The plaintiff then sued the defendants for the deceit, claiming as special damages the costs of this unsuccessful action. *Held*, that such costs could not be recovered. *Merritt v. John Nevin and Peter Nevin*, 540.

See ATTORNEY.—DEMURRER.—INTERPLEADER.—MUNICIPAL CORPORATIONS, 2.—REGISTRAR.

## COUNTY COURT.

See APPEAL, 2, 3 — MANDAMUS, 3.

## COVENANT.

*Pleading—Set-off.*]—The declaration stated that by indenture one W. G. mortgaged to the plaintiff and two others, as trustees of S., his unexpired term in certain lands, to secure the payment to said trustees of £400, and interest, which he thereby covenanted to pay at certain times specified; that said W. G. also by indenture mortgaged said term to the plaintiff, to secure the payment to him of £226 7s. 6d.: that under a power of sale in said last mentioned indenture the plaintiff duly sold the mortgaged premises to defendant at the following price—that is to say, that defendant should pay the mortgage to said trustees, and pay £150 to the plaintiff: that the plaintiff thereupon, in consideration of such price to be paid, assigned said premises to defendant, and defendant by the indenture of assignment covenanted with the plaintiff to perform the covenants in the mortgage to said trustees; and the plaintiff alleged that defendant had not paid the price so to be paid by him for his purchase, and had broken his covenant, in this, that although the last instalment of the mortgage money payable to the trustees was due and unpaid, yet defendant had not paid the same. Defendant pleaded, 1. As to so much of the declaration as relates to the price or sum of money to be paid by defendant to plaintiff, that he did not promise as alleged. 4. As to so much as relates to said price, a set-off for moneys due by plaintiff to defendant. 5. As to so much as relates to the plaintiff's claim in respect of the mortgage from W. G. to the trustees, a similar set-off. *Held*, on demurrer,

pleas bad, for the first was not a denial of the covenant sued upon, but an attempt to put in issue its legal effect: the fourth and fifth were pleaded to a cause of action not advanced, as the declaration was for the non-payment of money to the trustees, not to the plaintiff; and as to the fifth plea, the claim under the covenant to pay the trustees was not one to which a set-off could be pleaded. *Martin v. Clark*, 419.

2. *Construction—Principal and surety—Equitable defence.*]—The declaration recited that the Desjardins Canal Company were indebted to the plaintiffs in £13,000, which they had agreed to pay before the 1st of January, 1854: that by the 16 Vic., ch. 54, the defendants were authorised to become security to the plaintiffs on account of said company, for certain improvements on their canal to the extent of £15,000; and that after such statute defendants duly covenanted with the plaintiffs that the said company should pay them the said sum of £13,000 and interest, on or before the 1st of January, 1854, and that in default thereof defendants would pay the same. Defendants pleaded, on equitable grounds.—3. That the plaintiffs had agreed to build for said Canal Company a certain bridge over a channel to be cut by the plaintiffs to their canal, in consideration whereof the company covenanted to pay them £13,000 on the completion of said work, which said sum and the said channel and bridge are the sum and the improvements mentioned in the declaration; that defendants in pursuance of said statute entered into the covenant declared upon as security for the payment by the Canal Company of said sum: that the said agreement of the plaintiffs is subject to a condition precedent,



that the work should be approved of by the engineers of the plaintiffs and the Canal Company, &c., who should report when the same were executed, and that no such report was made before this suit. 4. On equitable grounds, that said channel and bridge were not completed before this suit. The plaintiffs replied, setting out the agreement in full, by which it appeared that the agreement of the Canal Company was to give security for the repayment of the money advanced by the plaintiffs "at the time and in manner as is stated in such securities." *Held*, on demurrer, both pleas bad, as shewing no equitable defence, for the covenant by defendants was absolute, that the Canal Company should pay on a certain day; and by the agreement the money was to be paid at the time mentioned in the security, not to be dependent on the completion of the work. *The Great Western Railway Co. v. The Corporation of the Town of Dundas*, 523.

See AGREEMENT.—MORTGAGE, 1.—  
PRINCIPAL AND SURETY, 1.

## COVENANTS FOR TITLE.

An assignee of part of the land conveyed by a deed containing a covenant for seisin in fee may sue upon the covenant and recover damages in proportion to his interest. *Keyes v. O'Brien*, 12.

## COVENANT TO RENEW.

*Action on, in lease—Measure of Damages.*]—See LANDLORD AND TENANT, 2.

## COVERTURE.

See DIVISION COURT, 2.

## CRIMINAL LAW.

1. *Breach of trust—Consol. Stats.*

*C., ch. 92, sec. 44—Meaning of the word "agents" in that clause.*]—The indictment charged that one M. entrusted to defendant, then being an agent, a promissory note of one R., for \$200, for the special purpose of receiving £6 thereon from A., and that defendant, contrary to the purpose for which said note was entrusted to him, did unlawfully negotiate and convert the same to his own use. It appeared that R. had made the note for A's accommodation, and A. being indebted to one C. in £6, it was agreed that he should deposit this note with M. to secure the payment. Defendant, by C.'s order, got the note from M. on condition that he should give it up to A. on the £6 being paid. A. afterwards paid this sum to defendant, but defendant kept the note and sued R. upon it, alleging that he was entitled to do so by some arrangement with R., which the jury found was not the case, and they convicted defendant. *Held*, that the conviction could not be sustained, for defendant was not an agent within the meaning of the act, which refers only to general agents of the descriptions specified; and *semble*, that upon the evidence he was not M.'s agent, or guilty of any breach of trust towards him. *The Queen v. Armstrong*, 245.

2. *Indictment—Forgery—Order for payment of money.*]—"Renfrew, June 13th, 1860. Mr. McKay:—Sir,—Would you be good enough as for to let me have the loan of ten dollars for one week or so, and send it by the bearer immediately, and much oblige your most humble servant, (Signed) I. ALMIRAS, P.P."

*Held*, not an order for the payment of money, within the Consol. Stat. C., ch., 94. *Regina v. Reopelle*, 260.

3. *Extortion by magistrates—Joint*

*offence.*]—Where two defendants sat together as magistrates, and one exacted a sum of money from a person charged before them with a felony, the other not dissenting, *Held*, that they might be jointly convicted. *Held*, also, not indispensable that the indictment should charge them with having acted corruptly. *The Queen v. Tisdale and Shaver*, 272.

4. *Indictment—Quarter Sessions—Jurisdiction—Capital offence.*]—At the quarter sessions the prisoner was found guilty on an indictment charging that she, on, &c., in and upon one B., in the peace of God and of our lady the Queen then being, unlawfully did make an assault, and him, the said B., did beat and illtreat, with intent him, the said B., feloniously, wilfully, and of her malice aforethought, to kill and murder, and other wrongs to the said B. then did, to the great damage of the said B., against the form of the statute in such case made and provided, and against the peace, &c. A count was added for common assault. The evidence shewed an attempt to murder, but it was moved in arrest of judgment that the court had not jurisdiction, for that it was a capital crime. under Consol. Stats. C., ch. 91, sec. 5. *Held*, that the indictment did not charge a capital offence under that section, nor an offence against any statute, but that the conviction might be sustained as for an assault at common law. *Regina v. McEvoy*, 344.

See EXTRADITION—MANDAMUS, 2.

## CUSTOMS.

1. *Collectors of customs—Surety bond—Transfer of collector to different ports—Effect of on liability of surety—Pleading.*]—*Sci. fa.* on a bond given by defendant as surety for

one A., collector of customs. Defendant pleaded that A. was appointed a collector of customs in Upper Canada, and was so appointed as collector at the port of B., and to no other office; that under the statute he was required to enter into a bond with sureties for the due performance of said office, and thereupon the defendant executed a bond in reference thereto, as follows:—setting out the bond at length. It recited that A. had been appointed to the office or employment of a collector in her Majesty's customs, and the condition was that so long as he should hold such office he should pay over all moneys received by virtue thereof. Defendant then alleged that the bond was executed in reference to said office of collector at B., and not in respect of any other office or employment, and that A., while he held said office, performed the duties and paid over all moneys received by virtue thereof; that afterwards he resigned said office, and was without defendant's knowledge or consent appointed collector for the port of N., and subsequently for the port of R., at both of which places the moneys received were more, and the duties heavier, than at B.; and that if any breach of duty occurred on his part it was in respect of those offices, and not of his office at B. aforesaid. The plaintiff replied that collectors of customs were and are appointed generally, and not to any particular place, so that they may be transferred as the service requires: that A. was so appointed generally, and the bond given in respect to such appointment; that as such collector he was, without any resignation, transferred respectively from B. to N., and from thence to R., at which last mentioned port the breach of duty sued for occurred—without this, that he was at the time of

giving said bond appointed collector at B., and not to any other office, and afterwards resigned said office. *Held*, on demurrer to the replication, plea bad, for setting up as a defence that the bond was given in respect to the office of collector at B. only, when, as set out in the plea, it was clearly not so, but as collector generally; replication good.

At the trial, upon issue taken on the replication, A.'s commission was put in, dated the 28th of May, 1850, appointing him "a collector of her Majesty's customs in the province of Canada," and a letter to the defendant from the customs department, of the 14th of May, informing him that he had been appointed collector of customs at the port of Bruce, and requiring him to furnish sureties. The bond was dated the 16th of May. The removal of A. to the ports mentioned in the plea was proved, and that he was in default at R., from whence he absconded. *Held*, that the defendant was liable for such default. *Regina v. Miller*, 485.

2. *Sale of goods—Attempt to defraud customs—Complicity of defendants—Set-off.*]—Plaintiffs had been in the habit of selling oil to defendants, the terms being payment on delivery free on board at St. John's, New Brunswick, and double invoices had been frequently sent by them, one giving the real selling price and the other less. It was not clear whether this was done at defendants' request or not, but they had written to the plaintiffs on one occasion, in giving an order, to "send invoices as before." In an action for the price of certain oil defendants endeavoured to set off the value of eight barrels which they had previously ordered and paid for, but never received. It appeared that when shipping this lot the plain-

tiffs' agent wrote to defendants "recommending" them, in order to "lessen the expenses, and especially in the duty," to send the bill of lading to the plaintiffs' friends, R. & S., at Portland, with instructions to include it in the bond and entry with the other lots sent to Messrs. J. T. & Co., at Montreal, forwarding agents, to pay the duties and forward to them. Plaintiffs accordingly wrote to R. & S. to do so, and this with the other lots consigned to R. & S. were entered upon an invoice of the whole furnished by the plaintiffs under the selling price, and seized by the collector at Montreal. The jury were directed that if the eight barrels were undervalued by the plaintiffs without defendants' privity or consent, in order to defraud the customs, the defendants might set off the price which they had paid for them, but that if defendants were concerned in the fraud they could not. *Held*, that the direction was right, and the evidence warranted a verdict for the plaintiffs. *The New Brunswick Oil Works v. Parsons et al.*, 531.

## DAMAGES.

*Mode of estimating in dower.*]—*See DOWER*, 2.

*On Covenant to renew in lease.*]—*See LANDLORD AND TENANT*, 2.

*Excessive damages—New trial granted.*]—*See NEW TRIAL*, 1.

*In an action against registrar for omission of mortgage in certificate.*]—*See REGISTRAR*.

*See COSTS.—COVENANTS FOR TITLE.*

## DEATH.

*Of sheriff—Right of his successor to assign bond to the limits.*]—*See BOND TO THE LIMITS*.

*See SEDUCTION.*



## DECEIT.

*Sale of goods—Action for deceit as to title—Right to recover costs of suit brought by purchaser.]—See COSTS.*

## DEED.

*Construction—Filling up blanks—Consideration—Effect of becoming a nun.]—The Crown, in 1798, granted 5000 acres, including the land in question, to John and Elizabeth Hay and three others, children of the late Governor Hay. In 1800 Elizabeth became a nun in Montreal, by which, according to the law of Lower Canada, she became civilly dead as regarded her property, and she afterwards died there in 1838. In 1804 John Hay conveyed “all his fourth part or share” of the lands mentioned in the above patent, “containing in all five thousand acres,” to his brother-in-law M., the husband of one of the patentees. This deed was executed in Indiana, and was expressed to be in consideration of natural love and affection, and of one dollar paid. When executed, the words “fourth” and “five thousand” were omitted, but attached to the deed was a letter of the same date, signed by the grantor, and addressed to M., in which he mentioned these blanks and told M. to fill them up according to the fact; adding in a postscript, that if any errors should be found in the deed he authorised M. to rectify them, and that such corrections should be valid as if he had made them himself. The words “fourth” and “five thousand” were inserted after M. received the deed in Lower Canada. On the 19th of January, 1805, M. and his wife Agatha, and John Hay, by deed reciting the patent, conveyed to R. and D. 2000 acres, parcel of the 5000 acres granted, “being the un-*

*divided part and portion of the said 5000 acres belonging, under and by virtue of the said letters patent, to John Hay and Agatha M.” This deed was executed by M. and his wife, and by John Hay by his attorney M., but there was no evidence of any power of attorney to M. On the same day, all the patentees except Elizabeth conveyed to R. and D. her share, assuming that it had vested in them by her becoming a nun. The plaintiff claimed under these conveyances—defendant under a deed from the heir-at-law of John Hay. *Held*, 1. That by the deed of 1804, John Hay’s share passed to M., the consideration being sufficient, and the insertion of the words mentioned not being fatal under the circumstances 2. That the conveyance of 1805 passed his share as belonging to M., though the execution by M., as his attorney, could have no effect for want of authority. 3. That Elizabeth clearly had not lost her share by our law, by becoming a nun. The plaintiff was therefore held entitled to a verdict for one-fifth and the defendant for the other. *Sir Charles James Stuart, Baronet, v. Prentiss et al.*, 513.*

*See EJECTMENT, 2; ESTOPPEL, 2.*

## DEFAMATION.

*See LIBEL AND SLANDER.*

## DELAY.

*See APPEAL, 2, 3—DEMURRER.*

## DEMURRER.

*Demurrer to plea—Judgment on demurrer—Application to withdraw, demurrer and reply.]—An action for maliciously causing a steamboat of one T. to be attached, was brought to trial, and resulted in a verdict for the plaintiffs, which was set aside*

and a new trial granted. Before the second trial defendant obtained leave to plead that his suit had been appealed, and was therefore undetermined when this action commenced, and this plea upon demurrer was held good. A year afterwards, the new trial not having taken place, the plaintiffs applied to rescind the order allowing the plea, or to withdraw the demurrer and reply matter which had arisen since the plea, on affidavit shewing that the defendant's appeal had since been dismissed, and that he resided out of the jurisdiction, so that if compelled to bring a new action the plaintiffs might lose the costs incurred. Judgment had not been entered on the demurrer. The court allowed the plaintiffs to withdraw the demurrer and reply, on payment of costs, without sanctioning any particular replication. *Griffith et al., Executors of Thompson, v. Ward, 33.*

### DESCRIPTION OF GOODS.

In an assignment the goods were described as "all the household furniture, goods, chattels, and effects, belonging to and being in the dwelling house of the said Burrowes and which are enumerated and set forth in the second schedule hereunto annexed; and also the stock in trade, implements of business, and machinery in the said schedule enumerated and set forth." In the margin of the schedule different localities were mentioned, and opposite to them the goods specified, the articles in question being as follows: stable and coach house—three horses, three sets of harness, one straw-cutter, one cow, one cutter, two buggies, &c. Lumber-yard—two waggons, one pair of bob-sleighs, four wheel-barrows, tressels and scaffolding, old lumber,

&c., two thousand feet of oak and hardwood plank and boards, sixty thousand feet of prime assorted sizes, two thousand feet of flooring, one pair of timber wheels, one hand cart, two yard dogs, cut stone. Held, that the articles in italics were sufficiently described, and passed as stock in trade, and that the description as to the others was insufficient. *Haworth et al. v. Fletcher, 278.*

See SALE OF GOODS, 1.

### DESCRIPTION OF LAND.

*Deed—Construction of—Description of land.*—The mortgage under which the defendants claimed described the land as all those certain parcels or tracts of land situate in the township of N., containing by admeasurement  $2\frac{1}{2}$  acres more or less, being composed of part of lot No. 23, in the 5th concession of the said township of N., particularly described in the deed of conveyance thereof made between, &c. This deed referred to was for  $2\frac{1}{2}$  acres, part of lot 23, in the 4th concession, and of lot 23 in the 5th concession, describing the part in each concession separately by metes and bounds, that in the 5th containing less than half an acre. Held, that the mortgage could not be taken to include more than the land in the fifth concession. *Ferrie v. Wright et al., 644.*

### DEVISE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, I. MORTGAGE, 1.

### DISTRESS.

See LANDLORD AND TENANT, 3.

### DIVISION COURTS.

See SET-OFF.

1. Division court execution—Sale of chattels real—Consol. Stats. U. C.,

ch. 19.]—A term for years in land cannot be sold under an execution from the division court, but only such things as can be delivered over to the purchaser, or such securities as the Consol. Stats. U. C., ch. 19, sec. 151, expressly authorises the seizure of. *Duggan v. Kitson*, 316.

2. *Prohibition.*]—*Held*, that under the facts stated in this case no ground was shewn for a prohibition to the division court: that the suit was clearly within their jurisdiction; and that the defence of coverture should have been set up in the court below. *Read v Wedge*, 456.

See SET-OFF.

## DOWER.

1. *Evidence of seisin—Estoppel.*]—In an action of dower by the widow of M., it appeared that a patent for the land issued to one K., and a witness was called, who proved that he was one of the subscribing witnesses to K.'s will, but the will was not produced, and no evidence of its contents given. It was proved, however, that B., the person from whom defendants purchased, derived title through P., who had held a bond for a deed from the patentee, and that P. before he sold to B. took a quit claim from M. of all his interest in the land, executed by M. only, in which it was stated that the land "was devised by will to the said M. by K., the original grantee of the Crown." *Held*, that no estoppel arose upon this deed, and that there was no proof of seisin in M. *Minaker v. Hawkins. Minaker v. Ashe*, 20.

2. *Conveyance and mortgage back on same day for purchase money—Improvements since husband's death—Mode of estimating damages and year-*

*ly allowance.*]—A. conveyed land to B. in 1833, and on the same day took back a mortgage for the whole purchase money. B. paid nothing either for principal or interest, and in 1840 re-conveyed absolutely to A., the land being then vacant. His wife did not join in either the mortgage or re-conveyance, and eighteen years after his death brought an action for her dower against the tenant, who had purchased from A. soon after he received the re-conveyance, and had erected valuable buildings. It was agreed that if entitled to dower she should be paid a yearly compensation in money, to be determined according to the decision of the court. *Held*, following *Potts v. Meyers*, 14 U. C. R. 499, that the widow was entitled to dower. *Held*, also, that the damages, to which she was entitled only from the time of demand made, should be calculated upon the average value of the land during that period, irrespective of improvements made by the tenant; and that the allowance to be paid to her should be estimated upon a computation of one-third of the occupation value of the ground only, without the buildings. *Norton v. Smith*, 213.

[This case has since been affirmed on appeal. See 7 U. C. L. J. 263.]

## EJECTMENT.

1. *Bond, construction of—Unsatisfied mortgage.*]—M., being the owner of the land in question, executed a bond to defendant, reciting that defendant was to reside with him and work the farm in common for their mutual advantage; that it had been agreed that after M.'s death it should become defendant's, and to secure this M. had that day made his will leaving it to him; and the condition was, that if defendant should use all diligence and economy in



working and improving the farm, and observe all esteem and regard to M. during his life, M. should not execute any other will, nor dispose of nor encumber the land. Afterwards they disagreed, and M. conveyed the land to the plaintiff, who brought ejectment, after having demanded possession. *Held*, that he was entitled to recover, as the bond gave defendant no legal right to possession. *Held*, also that an unsatisfied mortgage executed by M. before the bond, and put in by defendant, was clearly no bar to the plaintiff's recovery. *McDonald v. Murphy*, 355.

2. *Notice under Consol. Stats. U. C., ch. 27, sec. 17—Estoppel.*—In an action of ejectment the plaintiff proved a paper title, but the grant from the Crown did not issue until 1826, and the deed from the grantee was executed in 1824. This deed was lost, and the memorial of it produced as secondary evidence shewed it to have been an ordinary conveyance in fee, but did not shew what covenants it contained. The plaintiff gave a notice under Consol. Stats. U. C., ch. 27, sec. 17, and defendants shewed no title. *Held*, that the deed by the patentee should be presumed to have been one which would operate by estoppel, and that the statute applied. *Armstrong v. Little and Houston*, 425.

3. *Several plaintiffs—Proof of title.*—In ejectment where there are several plaintiffs claiming each an undivided interest, it is not necessary that they should prove a joint title, or any privity between them, but they may maintain a joint action upon separate titles. *Bradley and Rowe v. Terry*, 563.

See AGREEMENT, 1. — FORFEITED ESTATES.—LANDLORD AND TENANT, 1, 4.

## EQUITABLE PLEADINGS.

1. *Bond for purchase money of land—Equitable plea, want of title—Total failure of consideration not shewn.*—To an action of debt on bond for the payment of £350 and interest, by instalments, defendant pleaded, as an equitable defence, that the bond was given for the purchase money of a lease, which the plaintiff then held of a certain lot, and on condition that she should also procure from the rector of S. a lease of a certain other lot and assign it to defendant; and that the plaintiff had no term or interest in either lot. *Held*, that the plea was bad for not averring that defendant had not gone into possession under his purchase, and therefore not shewing a total failure of consideration: The plaintiff, however, did not demur, but took issue, and upon the evidence obtained a verdict, which the court refused to disturb. *Carlisle v. Hoskel*, 199.

2. *Action for land sold—Plea, payment—Equitable replication.*—To a declaration on the common count for land sold, defendant pleaded payment, and the plaintiff replied on equitable grounds, as to £316, part of the money claimed, that the cause of action was for land conveyed by the plaintiff to defendant by a certain indenture, in consideration of £930, the receipt whereof was then acknowledged; that notwithstanding said acknowledgment the defendant had not paid the sum of £316, but the same remained due, and defendant since the date of this indenture had always been in possession of the land. *Held*, on demurrer, a bad replication, as shewing the plaintiff's right to be an equitable one only. *Shaw v. Ross*, 262.

See COVENANT, 2.—MORTGAGE, 2, 3. PRINCIPAL AND SURETY, 1.

## EQUITY OF REDEMPTION.

*Sale of under execution.*]—See MORTGAGE, 2.—SHIPPING.

## ESCAPE.

*Action for escape—Limitation—Pleading.*]—To a declaration against a sheriff for an escape from arrest under a *capias*, defendant pleaded, 1. That the action did not accrue within two years. 2. That the plaintiff did not declare in the cause in which the arrest was made within one year, and did not prosecute said suit. *Held*, on demurrer, both pleas bad. *Wilson v. Munro, Sheriff*, 18.

## ESTOPPEL.

1. *Interpleader.*]—Where in an interpleader issue (the execution creditor being defendant) it appeared that the plaintiff had taken a bill of sale of the goods in question from the execution debtor while the *fi fa*. was in the sheriff's hands: *Held*, that he was not thereby estopped from denying the debtor's title, this action not being upon the deed, and between other parties. *Macaulay v. Marshall*, 273.

2. *Deed — Receipt for purchase money — Effect of—Pleading.*]—To an action on the common count for land sold and conveyed, defendant pleaded never indebted and payment, and at the trial he produced the conveyance to him, in which the receipt of the purchase money was acknowledged. *Held*, conclusive evidence under the plea of payment, and that it was unnecessary to plead the estoppel specially. *Ketchum v. Smith et al*, 313.

See COMMON SCHOOLS, 2.—DOWER, 1.—EJECTMENT, 2.—EQUITABLE PLEADINGS, 2.—INTEREST—LANDLORD AND TENANT, 1.—PRINCIPAL AND SURETY, 1.

## EVIDENCE.

*Heathen witness — Admissibility.*]—On a trial for murder an Indian witness was offered, and on his examination by the judge it appeared that he was not a christian, and had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared however that he had a full sense of the obligation to do so, and that he and his tribe believed in a future state, and in a Supreme Being who created all things, and in a future state of rewards or punishment according to their conduct in this life. He was then sworn in the ordinary way. *Held*, that his evidence was admissible. *Regina v. Puk-Mah-Gay*, 195.

See AGREEMENT, 1.—ATTORNEY.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 3.—COMMISSION TO EXAMINE WITNESSES.—CUSTOMS, 2.—EJECTMENT.—ESTOPPEL.—FALSE IMPRISONMENT, 2, 3.—GUARANTEE.—LANDLORD AND TENANT, 1, 3.—MUNICIPAL CORPORATIONS, 2.—OFFICES (SALE OF).—PRINCIPAL AND SURETY, 1, 2.

## EXCHANGE ON NEW YORK.

*Note payable with exchange on New York, not a note.*]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 6.

## EXECUTION.

See DIVISION COURT, 1.—MORTGAGE, 1.—SALE OF GOODS, 1.—SHIPPING.

## EXECUTORS.

See ADMINISTRATORS—BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.—LIEN.—MORTGAGE, 1.

## EXTORTION.

See CRIMINAL LAW, 3.



## EXTRADITION.

*Murder committed by a slave to prevent capture—Ashburton treaty—Consol. Stats. C., ch 89.]—*A being a slave in the state of Missouri, belonging to one M., had left his owner's house with the intention of escaping. Being about thirty miles from his home he met with D., a planter, working in the field with his negroes, who told A. that as he had not a pass he could not allow him to proceed, but that he must remain until after dinner, when he, D., would go with him to the adjoining plantation, where A. had told him that he was going. As they were walking towards D.'s house, A. ran off, and D. ordered his slaves, four in number, to take him. During the pursuit D., who had only a small stick in his hand, met A., and was about to take hold of him, when A. stabbed him with a knife, and as D. turned and fell he stabbed him again. D. soon afterwards died of his wounds. By the law of Missouri any person may apprehend a negro suspected of being a runaway slave, and take him before a justice of the peace; any slave found more than twenty miles from his home is declared a runaway, and a reward is given to whoever shall apprehend and return him to his master. A. having made his escape to this province was arrested here upon a charge of murder, and the justice before whom he was brought having committed him he was brought up in this court on a *habeas corpus*, and the evidence returned under a *certiorari*. It was contended that as A. acted only in defence of his liberty, there was no evidence upon which to found a charge of murder if the alleged offence had been committed here, and that he could not be demanded by the treaty. *Held*, that under the

Ashburton treaty, and our statute for giving effect to it, Consol. Stat. C., ch. 89, the prisoner was liable to be surrendered. *McLean, J.*, dissenting, and holding that the information, warrant of commitment, and evidence (to which no objection was taken on argument) were insufficient: that if the charge had been clearly made out the case was not within the treaty; and that the prisoner therefore was entitled to his discharge. *In the matter of John Anderson, committed under the extradition treaty with the United States, 124.*

## FALSE IMPRISONMENT.

1. *Justification by peace officer, under charge of felony—Pleading.]—*To a declaration for imprisoning the plaintiff, defendant pleaded, that at the time of making the arrest he was a peace officer for the county, and as such was informed that the plaintiff had committed a felony, and was then a fugitive from justice on account thereof; that, as he lawfully might, he arrested the plaintiff, and immediately caused him to be brought before the nearest justice of the peace to answer the said felony, and that the plaintiff was detained in the police station by said magistrate, which is the trespass complained of. *Held*, on demurrer, plea good. *Rogers v. Van Valkenburgh, 218.*

2. *Defendant not properly appointed constable—Failure to prove justification—Plaintiff guilty of fraud, and defendant's conduct bonâ fide—Verdict for defendant—New trial refused.]—*See the pleadings, ante, page 218. At the trial it appeared that the plaintiff had committed a gross fraud in the city of Detroit, in the United States: that the defendant having received a telegram



from a public officer there, arrested him in this province, and took him to the police station in London; and that after three days' detention he was discharged, on the ground that the offence was not within the Ashburton Treaty. The defendant had been chief of police in London, and afterwards appointed, from year to year, constable for the county. He had acted for the present year, and there was some evidence of his having been sworn in, but his name was not upon the list of the clerk of the peace of those appointed for that year. The jury were told that defendant having no warrant, and not being a peace officer at the time, the arrest was not strictly legal, and the plaintiff therefore entitled to recover. They found, however, for defendant, and the court refused to disturb the verdict. *Rogers v. Van Valkenburgh*, 220.

3. *False imprisonment—Evidence of arrest—Liability of magistrate.*—In an action for false imprisonment, it appeared that the defendant, as a justice, issued a warrant against the plaintiff, upon a complaint for detaining the clothes of one K.: that the plaintiff, on being told by the constable that he had the warrant, went alone to defendant, heard the evidence, was allowed to go away without giving bail, and returned the next day, when he was discharged. *Held*, that no imprisonment was proved, and that defendant having jurisdiction over the subject matter of the complaint, was not liable in trespass, even if the information were sufficient in point of form. *Thorpe v. Oliver*, 264.

See RAILWAYS AND R. W. COS. 6.

### FOREIGN LAW.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.—EXTRADITION.—INSURANCE, 2.

### FORFEITED ESTATES.

*Ejectment—Forfeited estates*—54 Geo. III., ch. 9; 59 Geo. III., ch. 12—*Construction of—Right of alien to devise.*—The 54 Geo. III., ch. 9, enacts that all persons seised of land in this province, who had withdrawn into the United States since the 1st of July, 1812, without license, or shall do so during the war, shall be considered aliens born, and incapable of holding land within the province. The Governor, &c., is to authorise persons in the several districts of the province to enquire and return by inquisition to the Court of King's Bench the names of such persons seised of land in the respective districts, and after such finding it is enacted that the lands found to have been theirs shall vest in His Majesty: provided, that nothing therein shall prevent persons interested from traversing the inquisition within one year after the finding, or after peace should be established. By 59 Geo. III., ch. 12, estates thus found are vested in Commissioners: provision is made for publishing the lands returned, and for settlement of all claims thereto: the Commissioners are directed to sell them; and it is enacted that all land on which no claim shall be made pursuant to the act, shall be taken against all persons, and to all intents and purposes to be vested in the Commissioners. The plaintiff claimed the land in question as devisee of one W., his father, who received a patent for it in 1798, and died in 1823, in the United States, having left Niagara, where he had been living, in 1813. The defendant claimed through a conveyance from the Commissioners, and put in a commission issued in 1815, under the 54 Geo. III., ch. 9, appointing certain persons named as Commission-

ers for the Niagara District, and giving them power to enquire whether said W. had gone over to the enemy during the war, and if so then what lands he was seised of. He proved also an inquisition in pursuance of this commission, finding that W. had gone over, and was seised of certain land specified in the town of Niagara, and of the land in question, which was in the Home District. The Commissioners conveyed in 1821 to one C., and the defendant claiming under him went into possession in 1822, the land being then in a state of nature, and had held ever since. The plaintiff had not been in this province for twenty years before the action.

*Held*, 1. That by the 59 Geo. III., ch. 12, the plaintiff was clearly precluded from contesting the Commissioners' title, and that he therefore could not recover. 2. That the fact of W. being an alien was well found, and extended in its effect to all vacant land of which he was seised, though not within the district to which the commission issued.

Whether as an alien the devise made by him was void, was discussed but not decided; but, *held*, that as the statute declared him to be an alien, and incapable of holding lands within the province, he was by it disabled from devising. *Wallace v. Hewitt*, 87.

[See 24 Vic., ch. 44, since passed.]

### FORGERY.

See CRIMINAL LAW, 2.

### FRAUD.

See COSTS.—CUSTOMS, 2 — FALSE IMPRISONMENT, 2.—MORTGAGE, 3. RAILWAYS AND R. W. COS., 1.

### FRAUDS (STATUTE OF).

See GUARANTEE.

### GAS COMPANIES.

*Obligation to supply gas—Mandamus—Consol. Stats. C., ch. 65, sec. 65.* ]  
—A gas company, incorporated under the Consol. Stats. C., ch. 65, having made a charge for a special illumination, which was disputed as excessive, refused to supply gas to the same premises for ordinary purposes until their claim had been paid. *Held*, that they were not justified in taking this course, but that a *mandamus* would not lie, as the statute imposed no duty; and that the only remedy was by action. *In the matter of the Commercial Bank of Canada, and the London Gas Company*, 233.

### GUARANTEE.

*Variance—Admissibility of parol evidence—Statute of frauds.* ]—The plaintiff sued on a guarantee, alleging, by way of inducement, that it was proposed to him by the defendant N., that if he would allow a certain assignment made to him of a leasehold property to be put on record, he N. would give him security on other real property for the payment of certain moneys, to which the plaintiff agreed; and the plaintiff averred that in consideration that he would allow the said assignment to be put on record, the defendants promised that the arrangement made with N. for the payment of the said balance should be duly carried out, otherwise the defendants would pay the plaintiff £135, that being the sum to be secured. The breach was, that the defendants would not carry out the said arrangement, nor secure to the plaintiff the £135. The defendant N. pleaded non-assumpsit. The guarantee, when produced, shewed that the defendants had not agreed absolutely to secure the

plaintiff, as alleged, but to pay the £135 if N. did not do so. *Held*, that verbal evidence of an agreement to the effect declared upon was inadmissible, and that it would at all events have been useless, for an agreement, either by the defendant I., to become responsible for N.'s default, or by both to give security on real property, must be in writing. *Irvine v. Nicholson et al.*, 464.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES 6.**—**MORTGAGE 1.**

### HARBOUR COMPANIES.

*Injury to land --- Liability.*—The plaintiff owned land upon a creek running into lake Erie, at the mouth of which defendants, incorporated by 12 Vic., ch. 60, constructed their harbour. A straight cut had been previously made by another company, of which the plaintiff had been secretary, from the creek, at or below his land, to the lake. While defendants were making their harbour the plaintiff requested them to deepen this cut, which they did, and at his request placed on his land the earth which they had dredged up. Before the defendants began their work, the plaintiff had piled along the front of his lot on the stream. but they did not pile along the land lower down, and the water being driven up from the lake by high winds, spread over this land and ran from thence on to the plaintiff's land, getting behind the piles which he had placed. *Held*, that the defendants were not liable for the injury thus caused. *Burwell v. The President, Directors, and Company of Port Burwell Harbour*, 341.

### ILLEGALITY.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.**—**CUSTOMS, 2.**

### IMPRISONMENT.

See **FALSE IMPRISONMENT.**

### INNKEEPER.

See **LIEN.**

### INSURANCE.

1. *Agreement to keep water on the premises—Effect of non-performance.*—Where by a policy of insurance the insured agreed to keep twelve pails full of water on each flat of the building during the continuance of the policy, and he neglected to do so, but it appeared that the loss was not in any way affected by his default: *Held*, that nevertheless he could not recover. *Garrett, Executor of Taylor v. The Provincial Insurance Company*, 200.

2. *Marine insurance—Abandonment—Construction of policy—Inconsistent provisions.*—Defendants insured a vessel for \$5000 by a policy which provided, among other things, that no acts of the insurers or insured in case of disaster with a view to saving the property should be considered as a waiver or acceptance of abandonment, but should be without prejudice to the rights of either party: that the insured should not have a right to abandon in any case, unless the amount which the insured would be liable to pay under an adjustment as of a partial loss, exclusive of general average, should exceed half the amount insured. A memorandum was written on the face of the policy, and set out in the plaintiff's declaration, as follows: "N. B. — It is hereby understood that the above named vessel is insured against total loss only, and no claim for general average loss or particular average loss to attach under the policy." The vessel struck upon a reef in the



St. Lawrence, on the 30th of July, in calm water and where no wind could affect her. On the 6th of August the plaintiff gave notice of abandonment, but defendants refused to accept it, and ten days after they got her off and repaired her, at an expense in all of about \$3000, the declared value of the vessel being \$15,000.

*Held*, 1. That the written memorandum providing against a recovery except for total loss must prevail, although several printed conditions inconsistent with such an agreement were left in the policy. 2. That the negative provision, that the insured should not have a right to abandon unless, &c., (as above,) would not enable him to do so as of course in the event specified, it not otherwise entitled. 3. That the evidence shewed no total loss, actual or constructive, and that the plaintiff therefore had no right to abandon. The test by which this right must be determined is whether a prudent man would think it worth his while to attempt to save and repair the vessel. The policy having been prepared in the United States, where defendants were incorporated, and transmitted to their agent here, with whom the plaintiff insured—that the law of this country, and not of the foreign country, should govern, the contract being in fact made here. *Meagher v. The Aetna Insurance Co.*, 607.

See AGREEMENT, 2.

### INTEREST.

*Recovery of principal and six per cent.—Subsequent action on agreement to pay a higher rate.*]—Plaintiff sued defendant as maker and A. as endorser of two notes, adding a count for interest, and at the trial to support this count he offered in evidence a written un-

dertaking signed by defendant, and a similar one by A., to allow him interest at the rate of thirty per cent., until payment, in consideration of the plaintiff allowing three months' time. The learned judge ruled that the action being joint, evidence of a separate liability against either defendant could not be received, and the plaintiff then took a verdict against both defendants for the amount of the notes and interest at six per cent. After judgment had been entered upon this and satisfied, he sued defendant on his undertaking, to recover 24 per cent., the balance of interest agreed to be paid by it. *Held*, that the judgment recovered was a bar to any further claim for interest upon the same notes. *McKay v. Fee*, 268.

See ARBITRATION AND AWARD, 2.—MANDAMUS, 3.

### INTERPLEADER.

*Costs.*]—Two interpleader actions having been twice tried, resulted in favour of the plaintiff, the claimant of the goods in question, and on application to the judge who granted the orders to dispose of the costs, the matter was referred to full court. *Held*, that the plaintiff was entitled as of right to the costs of the actions; and that the costs incurred before the issues, in procuring the order, &c., should also be paid by defendant; but the question raised as to the discretion of the court in such cases being a new one, each party was ordered to pay his own costs of the application. *Bellhouse v. Gunn*, 555.

See ESTOPPEL.—SALE OF GOODS, 1.

### JOINT STOCK COMPANIES.

See GAS COMPANIES.—HARBOUR COMPANIES.—RAILWAYS AND R. W. Cos., 4.

## JUDGE.

*Interest and relationship to parties.*  
*—Refusal of judge to act.—Application for mandamus.]—See MANDAMUS, 3.*

## JUDGMENT.

*Appeal from County Court.—Application to amend judgment.]—See APPEAL, 2.*

*See INTEREST.*

## JURISDICTION.

*Of Quarter Sessions.]—See CRIMINAL LAW, 4.—QUARTER SESSIONS.*

*Of Division Court.]—See DIVISION COURT, 2.*

*See MUNICIPAL CORPORATIONS, 1.*

## JURY.

*See NEW TRIAL, 2, 4.*

## LANDLORD AND TENANT.

*Expiration of term—Agreement for new lease—Position of tenant before lease executed—Offer to leave—Ejectment—Denial of plaintiff's title—Notice to quit—E. toppel.]—*Defendant had been tenant to the plaintiff at a yearly rent, payable quarterly, for a term which expired on the 1st of June, 1859. About that time a new lease was agreed upon between them at an advanced rent, but none was executed owing to objections raised by defendant to the draft. Defendant paid a year's rent, and another quarter having fallen due the plaintiffs distrained, but they afterwards abandoned that proceeding, and on the 17th of September, 1860, the plaintiffs' attorney served a written demand of possession on defendant, who told him that was just what he wished, and that the plaintiffs might have the place. He refused, however, to go at once with

the attorney and give it up, saying that he wished first to remove some things. Nothing more was done, and the plaintiffs three weeks after having brought ejectment, defendant besides denying their title claimed to hold as their tenant. *Held*, that the plaintiffs were entitled to recover, for 1, the defendant having denied their title could not insist upon notice to quit; and, 2, he was estopped by his offer to leave the place. *Seemle*, that defendant, though he had not accepted the lease tendered, was, under the circumstances, the plaintiffs' tenant. *Burns, J.*, dissenting, on the ground that defendant being in as a yearly tenant, what took place on the 17th of September did not alter his position, and that his notice was only a denial of the plaintiffs' right to possession, not of their title. *Curtwright et al. v. McPherson, 251.*

2. *Lease—Covenant to renew—Breach—Measure of damages.]—*Defendants leased certain lands to one W. for eight years, on which the lessee covenanted to erect a good house during the first year, and the plaintiffs covenanted to grant a renewal lease for ten years at the expiration of the term, at a rent to be fixed by arbitration. The defendants were unable to renew, owing to a decree of the Court of Chancery, declaring that they had no power to grant the lease. The buildings, which were of wood, were removed, and sold under execution against the plaintiff, who had purchased the term two years before it expired for \$3000. In an action against defendants on their covenant to renew: *Held*, that the plaintiff was entitled to recover the value of the occupation of the premises, with the buildings, above the probable ground rent, for the term which he had lost, and that

\$2500, the amount of the verdict, found, was not excessive. *McLean*, J. dissenting, and holding that he could recover only nominal damages, on the grounds, 1. That for the renewal term he would be liable to pay rent upon the buildings as well as the land, and 2. That in the absence of fraud he could not recover for the loss of his bargain. *Van Brocklin v. The Corporation of the town of Brantford*, 347.

3. *Acceptance by telegraph—Subsequent entry—Commencement of rent.*]—A. living at Collingwood wrote to B. at Toronto, on the 5th of July, 1859, to the effect that he would give £40 a year for his house and pay taxes, adding, if you agree telegraph at once to that effect and I will take it. On the 6th B. telegraphed: "You may have the store for one year on terms of your letter." A. obtained the key from the former tenant on the 11th, and first entered on that day. *Held*, that there was a perfect demise: that the rent commenced from the acceptance by B. of A.'s offer, not from the time when A. entered; and that B. was therefore entitled to distrain for a year's rent on the 7th of July, 1860. *Prosser v. Henderson*, 438.

4. *Lease—Construction.*]—The plaintiff on the 1st of April, 1858, leased certain land to defendant for five years at £100 a year, payable half-yearly, on the 1st of April and October *in advance*, and the lease contained the following provision: "It is mutually agreed on between the said parties, that is, if S. E. (the lessor) requires the premises before the term expires, he is to pay £50 to W. R. (the lessee) for possession; otherwise should W. R. require to leave before the term, he has to pay S. E.

£50." On the 6th of September, 1860, the plaintiff notified defendant that he would require the premises on the 10th of October following, and on that day he tendered the £50, which defendant refused. *Held*, that he was entitled to maintain ejectment.

It was not proved at the trial whether the rent due on the 1st of October for the next six months in advance had been paid or not. *Quere*, whether if it had been shewn that the plaintiff received it, this would affect his right. *Eckhardt v. Raby*, 458.

*See* RAILWAYS AND RAILWAY COS., 7.—SHERIFF.

## LEASE.

*See* LANDLORD AND TENANT.

## LIBEL AND SLANDER.

*Slander—Libel—Fraud in sale of land—Words not actionable—Pleading.*]—The first count set out that the plaintiff was a trader in the purchase and sale of land, and in the lending of money: that the defendant had purchased a lot of land for himself and the plaintiff, which they agreed to divide by lot, one to take the east and the other the west half, the latter being of most value: that two slips of paper were used, marked east half and west half respectively, and that defendant drew the east half. And it was alleged that in speaking of the plaintiff in reference to his said trade and to this transaction, defendant had asserted that the slips were prepared by the plaintiff, who asked the defendant to draw first, and that after having drawn he discovered the plaintiff altering the E. on the other slip into W., so that in fact both had E½ on them, and defendant was thereby precluded from getting



any thing but the east half. In another count, after stating the same trick, defendant was alleged to have added, "It then struck me I was swindled." And in another he was said to have prefaced the relation with, "He cheated me out of 100 acres of land," and concluded by saying, "so he cheated and swindled me out of the lot." *Held*, on demurrer, that no cause of action was shewn, for the words alleged in the first count could not be treated as spoken of the plaintiff in any trade or business, but in a private transaction; and the additional words stated in the other counts were not of themselves actionable. A fifth count charged defendant with saying that one M. at the time of the election had mortgaged his property to the plaintiff without consideration, and that the plaintiff afterwards foreclosed and took it from him without paying any thing, and adding, "The fact is he is a villain and a thundering thief."—*Held*, not actionable. The sixth count was for a libel, in which the defendant had stated that the plaintiff stood charged with the crime of forgery, committed not against one man but a whole community. Defendant pleaded, justifying this charge by setting out at length a fraud committed by plaintiff and others at an election by falsifying the poll books, and inserting fictitious votes, and his trial and conviction therefor; and he alleged that this was what he referred to in that part of the libel, and was understood to mean by all to whom it was published. *Held*, sufficient. *Fel-lows v. Hunter*, 382.

### LIEN.

*Innkeeper — Special agreement — Bond to the Crown.*]—In *sci. fa.*, upon a bond to the Crown, it appeared that

A., the obligor, had lived at an hotel with his family for some time, using his own furniture; that when he wished to leave the landlord objected to the removal of the furniture until payment of his bill, and that the obligor consented that a large portion of it should remain as security. *Held*, that although the landlord could have no lien as an innkeeper, A. being in his house as boarder upon a special understanding, yet that he was clearly entitled to it by the agreement with A., and that A.'s administrator was justified therefore in paying him, as against the Crown. *The Queen v. Charles J. S. Askin, Administrator of Duncan McGregor Askin*, 626.

### LIMITATIONS (STATUTE OF)

1. *Action for obstructing river—Prescriptive right — Pleading.*]—*Declaration*, for maintaining a dam across the Grand river, below the plaintiff's land, and thereby penning back the water thereon. *Plea*, that the dam was erected on a close occupied by defendant, for the purpose of supplying certain mills on said close with water, and had in it certain sluices or gates to let off or keep back the water, as might be required for the use of said mills: that the defendant and other occupiers of said mills had enjoyed as of right, and without interruption, for twenty years before this suit, the right of keeping up said dam and of closing the gates therein as often as occasion might require for the purpose aforesaid, and the right of damming back the water on such occasions, and of causing the same to overflow a portion of the plaintiff's land, doing no unnecessary damage in the use of such right; and that the injuries complained of were thus caused. *Held*, on demurrer, plea good. *Robinson, C. J.*,

doubting whether it should not have been averred more plainly that the injury to the plaintiff during the twenty years had been the same. *Bechtel v. Street*, 15.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 7.—**ESCAPE**.  
—**RAILWAYS AND RAILWAY COS.**, 2, 6.—**REGISTRAR**.

### LIMITS.

See **BOND TO THE LIMITS**.

### LOTTERY.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 4.

### MAGISTRATES.

*Extortion by—Joint offence—Indictment.*]—See **CRIMINAL LAW**, 3.  
See **FALSE IMPRISONMENT**.

### MALICIOUS PROSECUTION.

See **APPEAL**, 1.

### MANDAMUS.

1. *School Trustees—Mandamus—Attachment—Practice.*]—A mandamus nisi having been issued to school trustees to levy the amount of a judgment obtained against them, no return was made, and a rule nisi for an attachment issued. In answer to this rule one trustee swore that he had always been and still was desirous to obey the writ, and had repeatedly asked the others to join him in levying the rate, but that they had refused. Another swore that owing to ill health, with the consent of his co-trustees and the local superintendent, he had resigned his office before the writ was granted. The court, under these circumstances, discharged the rule nisi as against these two, on payment of costs of the application,

and granted an attachment against the other trustee, who had taken no notice either of the mandamus or rule. *Regina v. The Trustees of School Section No. 27, in the township of Tyendinaga, in the county of Hastings*, 528.

2. *Mandamus to repair bridge—Indictment—Practice.*]—A mandamus nisi having issued commanding a municipal corporation to repair and build a bridge, it appeared on the return that the liability was disputed on several grounds, it being contended that the bridge did not belong to defendants: that it was not constructed on the site provided by the charter of the original company which built it, and was in an unfit and dangerous place; and that it should be repaired by another municipality. *Held*, that under these circumstances a mandamus would not lie, and that the applicants must proceed by indictment; and *semble*, that the latter is the proper remedy in all cases, except where a charter has been obtained to construct the road, and the work has never been done. *The Queen v. The Municipal Corporation of the County of Haldimand*, 574.

3. *Refusal of judge to act—Application for mandamus—Interest of judge, and relationship to parties.*]—A garnishee summons having issued in a county court suit, one H. opposed it as assignee of the judgment debtor, and in answer to his claim an affidavit was filed, from which it would appear that the judge was interested with H. in his claim. He then declined to act further in the matter, and after several subsequent meetings signed a memorandum, stating as an additional reason for refusing to proceed the fact that H. was his brother-in-law. The court under these circumstances refused a mandamus to compel the

judge to dispose of the case. *In the matter of the judge of the County Court of Elgin*, 588.

See GAS COMPANIES. — MUNICIPAL CORPORATIONS, 1. — RAILWAYS AND R. W. COS., 8.

### MASTER AND SERVANT.

See RAILWAYS AND R. W. COS. 5.

### MEASURE OF DAMAGES.

See DAMAGES.

### MERGER.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

### MONEY HAD AND RECEIVED.

See PARTNERS AND PARTNERSHIP.

### MONK.

See NUN.

### MORTGAGE.

1. 12 Vic., ch. 73—*Sale by sheriff of equity of redemption—Purchase by one of several devisees of mortgagee—Effect of on covenant to guarantee the mortgage—Proof of will.*—A. made a mortgage of lands to Z. and the defendant, and the defendant assigned his interest therein to Z., covenanting by the same instrument for the punctual payment by the mortgagor of one half of the principal and interest. To an action brought on this covenant by the executors of Z., defendant pleaded that a judgment had been recovered against the mortgagor on said mortgage, for the benefit of Z., who afterwards devised all his real estate to the plaintiffs, and that the equity of redemption having been duly sold under said judgment, was purchased by the plaintiffs, as such executors and devisees, and con-

veyed to them by the sheriff, whereby the debt became satisfied, and defendant was discharged. In another plea it was alleged that the equity of redemption was purchased by M., one of the plaintiffs, and the conveyance thereof taken to him for the benefit of himself and the other plaintiffs, as such executors and devisees. *Held*, 1. That the plaintiffs, as devisees of Z., were assignees of the mortgage within the 12 Vic., ch. 73, and that the purchase by them of the equity of redemption must have the same effect as if it had been by Z. in his lifetime. 2. That the effect of the statute was to work a satisfaction of the mortgage, though the provision is merely that the mortgagee, &c., buying, shall give a release to the mortgagor; and *semble*, that the defendant, instead of setting out the facts, might have pleaded payment in the ordinary form. 3. That upon the facts stated in the second plea, the case must be looked upon as if all the executors had been purchasers. 4. That the mortgage being satisfied, defendant was also discharged from his covenant; and therefore that the second plea (which was demurred to) shewed a good defence. The will of Z. not having been properly proved by one of the subscribing witnesses, and the objection having been taken, the court could not enter a verdict for defendant on the leave reserved, but granted a new trial on payment of costs. *Woodruff et al, Executors of Samuel Zimmerman, v. Mills*, 51.

2. *Covenant on mortgage given for purchase money—Equitable plea—Title defective owing to prior mortgage upon the land—Replication, a signment of such mortgage*—To an action on a covenant for payment of mortgage money defendant pleaded, on equitable grounds, that the mortgage was of certain land: that be-



fore executing the same the plaintiff was or professed to be owner of said land free from incumbrances, and as such owner proposed to defendant to purchase the same: that defendant, relying upon the representations of the plaintiff that he was the owner of the said land, free from incumbrances, purchased the same from the plaintiff for £300, and paid him £75 on account, and thereupon the plaintiff executed a deed to him containing the usual covenants for title free from incumbrances, and defendant executed the mortgage declared on to secure the balance of purchase money: that the plaintiff was not then the owner of said land free from incumbrances, but there was a mortgage to the Trust and Loan Company, including this and other lands, therefore executed by one G. W., which fact was not communicated to defendant, but was concealed from him at the time of said sale, otherwise he would not have purchased said land, or executed the mortgage declared on: that the said mortgage to the Trust and Loan Company not having been paid, the land was sold under their power of sale, whereby defendant lost and was deprived of said land, and his improvements thereon, together with the money already paid by him; and defendant alleged that the plaintiff was wholly insolvent, so that he could recover nothing from him, and that it would therefore be inequitable to allow him to compel payment of the balance of said purchase money. The plaintiff demurred to this plea; and replied that before action he had assigned the mortgage and the money secured by it for a valuable consideration, and that the assignees, for whose benefit the suit was brought, had no notice or knowledge of the facts pleaded: that the conveyance of said land to defendant

was executed by one W. and not by the plaintiff; and that at the execution thereof defendant had notice of the mortgage to the Trust and Loan Company, &c., &c. *Held*, on demurrer, that the plea was insufficient, for the covenants for title in the deed, which must be assumed to be qualified, would afford no ground of action for the incumbrance complained of, not created by the plaintiff; and there was no allegation of fraud on the plaintiff's part which would entitle defendant to relief in equity. *Held*, also, that if the plea were sufficient the replication contained a clear answer to the defence set up by it. *Quære*, whether the plea was bad as shewing an equitable defence not admissible under the C. L. P. Act. *Whitehouse v. Rees*, 65.

3. Defendant having been allowed to amend, pleaded that before making the mortgage sued on the plaintiff falsely and fraudulently represented himself to be the owner of the land, free from all incumbrances, but that the legal estate was vested in one W., who held in trust for him: that defendant relying upon his representation purchased the land, &c., although the plaintiff then well knew of the mortgage to the Trust and Loan Company, which he fraudulently concealed from the defendant; and thereupon said W., at the plaintiff's request, conveyed to defendant by a deed containing absolute covenants for title free from incumbrances, and defendant executed the mortgage sued on to secure the balance of purchase money. The plea then alleged the existence of the mortgage to the Trust and Loan Company, which fact was well known to the plaintiff at the time of such sale and false representations, but was fraudulently concealed by him from de-

defendant for the purpose of defrauding defendant, who otherwise would not have purchased; that the land was sold by the Trust and Loan Company, and defendant was evicted therefrom, and lost the same, &c. The plaintiff replied the assignment of the mortgage before action, as in his previous replication, denied the false representations and fraudulent concealment alleged, and averred that the mortgage to the Trust and Loan Company had been duly registered before the execution of the conveyance to the plaintiff, and that the defendant had notice of the said mortgage when he executed that declared on; and the former actions brought on the covenant, and defendant's acts in taking possession of the land, &c., were alleged as before. *Held*, on demurrer to the replication, that it was clearly a good answer to the plea. *Seemle*, that the plea shewed a good legal defence on the ground of fraud, but was not such an equitable plea as could be admitted under the Common Law Procedure Act. *Whitehouse v. Roots*, (the same case on amended pleadings,) 78.

*See* **BILLS OF EXCHANGE AND PROMISSORY NOTES 5.—DOWER 2.—EJECTMENT 1.—SHIPPING.**

### MUNICIPAL CORPORATIONS.

1. *Valuation for county rate—Consol. Stats. U. C., ch., 55, secs. 70, 71—By-laws—Construction of.*—It is provided by the Assessment Act, Consol. Stats. U. C., ch 55, sec. 70. "That the council of every county shall yearly, before imposing any county rate, and not later than the first day of July, examine the assessment rolls of the different townships, towns, and villages in the county, for the preceding financial year, for the purpose of ascer-

taining whether the valuation made by the assessors in each township, town, or village, for the current year, bears a just relation to the valuation so made in all such townships, towns and villages; and may, for the purpose of county rates, increase or decrease the aggregate valuations of real property in any township, town, or village, adding or deducting so much per cent. as may in their opinion be necessary to produce a just relation between all the valuations of real estate in the county, but they shall not reduce the aggregate valuation hereof for the whole county as made by the assessors." Upon an application to quash a by-law imposing a county rate: *Held*, that except perhaps when a dishonest intention on the part of the council is clearly shewn, (which was not the case here,) the court have no authority to over-rule the valuation on the ground of its alleged unfair or unequal effect. Remarks as to the proper mode of proceeding under the above provision of the statute. The court refused a mandamus commanding the council to proceed as directed by the act, as it was not clear that they had not complied with it by their by-law.

If for all that appears a by-law may be legal it will be upheld; and in this case, where it was not clear upon the face of the by-law, nor otherwise shewn, that the money to be raised by it was for services not belonging to the current year, the omission of recitals and provisions which would in that case have been essential was held no objection. *Gibson and the Corporation of the United Counties of Huron and Bruce*, 111.

2. *Separation of town from county—Arbitration—Consol. Stats. U. C., ch., 54, secs., 26, 358.*—Upon

motion to set aside an award made under Consol. Stats. U. C., ch. 54, sec. 26, *Held*, that it was not necessary that such award should direct the town to pay any portion of the existing debt of the county, and that the arbitrators, finding that the whole debt had been incurred for making roads which had been of no benefit to the town, were justified in awarding that the town should pay nothing on account of such debt, and that the county should refund what the town had paid towards the construction of such roads. The arbitrators did not take or file any oral or documentary evidence, (under sec. 358, sub-sec. 13) but relied upon the knowledge which two of them had of the position of the municipalities towards each other with relation to money matters, and obtained the specific sums on which their award was based from the books of the county treasurer. These sums were shewn to the warden at the last meeting of the arbitrators, and their correctness was not disputed. *Held*, sufficient. *Held*, also, that the arbitrators had no power to award as to costs, and that part of the award was set aside. *In the matter of the Arbitration between the Corporation of the United Counties of Northumberland and Durham and the Corporation of the Town of Cobourg*, 283.

3. *City corporation—Gaol committee—Laying corner stone—Entertainment—Order given by committee for wines, &c.—Refusal by council to pay—Liability of committee.*—Defendants were a committee of the city council to inspect and superintend the building of a gaol. It was determined at a meeting of the committee that there should be a ceremony on the occasion of laying the corner stone, and a luncheon given in St. Lawrence Hall; and one of

the defendants, the chairman, gave an order addressed to the plaintiff as "commission merchant," for the supply of certain wines specified, to be sent to the St. Lawrence Hall, directing him to render his account to the board of gaol inspectors. The plaintiff sent his bill to the chamberlain's office, headed "K. T., chairman, board of gaol inspectors, bought of G. Thomas, agent." The council however refused to sanction the expenditure, and he then sued the members of the committee who were present at the meeting when the order was given. *Held*, that they were personally liable, and that the plaintiff might sue in his own name.

One of the defendants, the mayor, was present at the meeting referred to, and at first objected to the expense, but when told that it would be less than he had heard, he did not persevere in his opposition. He afterwards wrote to the chairman to say that he would attend the ceremony, but would not be at the luncheon, because he was obliged to leave town on business, and because he disapproved of so great and unsatisfactory an expenditure by the committee. *Held*, not sufficient to exempt him from liability with the others. *Thomas v. Wilson et al.*, 331.

4. *By-law—Harbour—Wharves—Tolls* ]—A municipal corporation by by-law authorised individuals to erect wharves, and to remunerate themselves by charging tolls on goods, part of which were directed to be paid to the treasurer of the municipality. The harbour master was empowered to detain any vessel having on board any goods on which these tolls were unpaid, or any such goods; and a fine of not less than \$1 nor more than \$50, was imposed on any master or owner of a vessel



refusing to comply with these conditions, to be enforced by distress and sale. *Held*, that the by-law was illegal; but see 24 Vic., ch. 63, since passed. *In the matter of Haggaman and Chisholm, and the Corporation of the town of Owen Sound*, 533.

See RAILWAYS AND R. W. COS. 4.

## MURDER.

See CRIMINAL LAW, 4.—EXTRADITION.

## NEGLIGENCE.

See ATTORNEY. — PARTNERS AND PARTNERSHIP. — RAILWAYS AND R. W. COS., 2, 3, 5.—REGISTRAR.

## NEW TRIAL.

1. *Excessive damages—New trial.*]—Verdict for £50 against a railway company for putting the plaintiff off a train, though the inconvenience occasioned to him was trifling, and the conductor acted *bonâ fide*, under an impression that the plaintiff had not paid his fare, and without harshness or violence. New trial granted for excessive damages. *Hunt'sman v. The Great Western Railway Company*, 21.

2. *Short absence of juror after close of case—Mistake—New trial refused.*]—At the trial of an action for overflowing land, the jury were allowed to separate at the end of the first day, before the case was closed. After they had retired to consider their verdict next day, one juror was allowed to go out in charge of a constable, and on his return met the people coming out of the court house, who told him that the court was over and the jury dismissed for that day. He then went home, but was brought back by the constable in less than an hour, and came in with the rest of the jury in a short time to deliver the verdict for the

defendants. He swore that during his absence he had had no conversation about the suit, and no misconduct was imputed to defendants in the matter. The court, under these circumstances, refused to disturb the verdict. *O'Mullin v. Bishop and Murphy*, 275.

3. *Bond not sealed.*]—It appeared that defendants having signed the bond sued on left in a hurry, without having it properly sealed, which was afterwards done, but it was clear that they knew it to be a bond, and it was stated on the face of it to be under seal. The jury having found against this defence the court refused to interfere, holding it not one to be favoured. *Mutual Fire Insurance Company of Prescott v. Palmer et al.*, 441.

4. *Affidavits of jurors*]—In an action for overflowing land, where a verdict had been found for the plaintiff, the court refused a rule *nisi* for a new trial, moved for upon the affidavits of two of the jurors, that they had examined the premises since the trial, and were satisfied that the verdict was incorrect. *Purdon v. Playfair*, 282.

See ATTORNEY—EQUITABLE PLEADINGS, 1. — FALSE IMPRISONMENT, 2. MORTGAGE, 1. — QUARTER SESSIONS.

## NOLLE PROSEQUI.

See PARTNERS AND PARTNERSHIP.

## NOTICE.

*To defendant in ejectment under Consol. Stat. U. C., ch. 27, sec. 17.*]—See EJECTMENT, 2.

*By defendant in ejectment denying title of the plaintiff, his landlord—Effect of.*]—See LANDLORD AND TENANT, 1.

*To sheriff of rent due—When to be given.*]—See SHERIFF.

## NOTICE OF ACTION.

*Consol. Stats. U. C., ch. 19, sec. 193* ]—A notice of action given to a division court bailiff under *Consol. Stats. U. C., ch. 19, sec. 193*, stated that the writ would be sued out of the county court of the county of Brant, and the plaintiff afterwards brought his action in the county court of Wentworth. *Held*, affirming the judgment of the court below, that the notice was insufficient. *Buck v. Hunter*, 436.

See REGISTRAR.

## NOTICE TO QUIT.

See LANDLORD AND TENANT, 1.

## NUN.

*Becoming a nun—Effect of on real estate.*]—See DEED.

## OFFICES, (SALE OF.)

*Sheriff—Sale of deputation of his office—Illegality—Forfeiture of office—5 & 6 Ed. IV., ch. 16; 49 Geo. III., ch. 126.*]—The defendant, a sheriff, agreed, as the jury found, with one O., to give him all the fees of his office, except for certain services specified, in consideration of which O. was to pay him £300 a year, quarterly in advance, not out of the fees, but absolutely, and without reference to their amount. *Held*, clearly an agreement prohibited by the 5 & 6 Ed. VI., ch. 16, and 49 Geo. III., ch. 126, and that the effect of it was to forfeit the office upon conviction under a proceeding by *scire facias*. *Held*, also, that the evidence stated in the case warranted the jury in finding that the agreement was in the terms above mentioned. *Regina v. Moodie*, 389.

## ORDER FOR PAYMENT OF MONEY.

See CRIMINAL LAW, 2.

## PAROL EVIDENCE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—GUARANTEE.

## PARTNERS AND PARTNERSHIP.

*Money had and received—Partnership—Dissolution before receipt—Count for negligence added at trial—Right to make such amendment—Nolle prosequi, effect of.*]—Defendants H. and G., who had been in partnership as brokers, were sued for money had and received, the cause of action being for the proceeds of two notes made by the plaintiff, payable to them, to be discounted, which it was alleged that they had received and not paid over. G. allowed judgment to go by default. It appeared that the plaintiff had handed the notes to G., acting for the firm, to get them discounted for him: that they were endorsed in the name of the firm while it continued; and that after the partnership had been duly dissolved G. sold them, and received the proceeds, which he applied to pay a debt of his own, contracted by him in the name of the firm, H. not being aware of the sale. It was objected that the plaintiff could not recover against both defendants on this evidence, and the plaintiff was then allowed at the trial to add a count charging that defendants as brokers received the notes to negotiate for the plaintiff and pay him the proceeds, but that by their neglect of duty said notes, before they became due, were endorsed by defendants, and came so endorsed into the hands of one G., who sold the same to one A., and applied the money to his own use; and that the plaintiff was afterwards compelled to pay the notes to A. The plaintiff entered a *nolle prosequi* as to Grier, and defendant refused to plead to this

count, objecting to its being allowed. The jury having found a general verdict for the plaintiff: *Held*, that the plaintiff could not recover against both defendants on either count, for as to the first count the money was not received by the firm, but by G. alone, after the dissolution, and without the knowledge of H.; and as to the second, it was no breach of duty in G. to discount the notes, that being the purpose for which he received them, and for the wrong committed by him in not paying over the money received after the partnership had ceased, H. was not liable. *Held*, also, that the plaintiff having entered a *noile prosequi* on both counts as against G., the verdict being general could not have been maintained as against H., though the second count was in tort. *Held*, also, that the amendment was improperly allowed, not being necessary to determine the real question in controversy in the existing suit, but the substitution of a new cause of action. *Hammond v. Heward and Grier*, 36.

[See *Hammond v. Heward and Grier*, 11 C. P. 261.]

#### PAYMENT.

See *EQUITABLE PLEADINGS*, 2.—*ESTOPPEL*, 2.—*MORTGAGE*, 1.

#### PEACE OFFICER.

See *FALSE IMPRISONMENT*.

#### PLEADING.

See *APPEAL*, 1.—*ARBITRATION AND AWARD*, 1, 2, 6.—*BILLS OF EXCHANGE AND PROMISSORY NOTES*, 2, 4, 5.—*COVENANT*.—*CRIMINAL LAW*, 3, 4.—*CUSTOMS*, 1.—*DE-MURRER*.—*EQUITABLE PLEADINGS*.—*FALSE IMPRISONMENT*, 1.—*LIBEL AND SLANDER*.—*LIMITATIONS (STATUTE OF)*.—*MORTGAGE*.—

*PRINCIPAL AND SURETY*, 1.—*RAILWAYS AND R. W. COS.*, 4, 5. *SHERIFF*.—*TRESPASS*.

#### POSSESSION.

*Change of under 20 Vic., ch. 3.*—*See SALE OF GOODS*, 1.

See *AGREEMENT*, 1.—*LANDLORD AND TENANT*, 1.—*RAILWAYS AND R. W. COS.*, 7.

#### POWER OF ATTORNEY.

See *PRINCIPAL AND SURETY*, 1.

#### PRACTICE.

See *AMENDMENT*.—*APPEAL*, 2, 3, 4.—*ARBITRATION AND AWARD*, 3, 4, 5.—*INTERPLEADER*.—*MANDAMUS*.—*NEW TRIAL*.—*QUARTER SESSIONS*.

#### PRESCRIPTION.

See *LIMITATIONS (STATUTE OF)*.

#### PRESUMPTION.

See *EJECTMENT*, 2.

#### PRINCIPAL AND AGENT.

See *PRINCIPAL AND SURETY*, 1.

#### PRINCIPAL AND SURETY.

1. *Discharge by giving time*—*Equitable plea*—*Power of attorney*—*Authority of agent*—*Assent of principal*.]—*Declaration*, that defendant assigned to the plaintiff a mortgage executed to defendant by one W., and by the deed of assignment covenanted that W. should pay the principal and interest when due, and that upon default made by W. defendant would pay the same; that W. made default, but defendant did not pay. *Plea*, on equitable grounds, that defendant covenanted as surety only for W.: that the plaintiff when he took the deed knew him to be so, and accepted



him as such; and that the plaintiff afterwards, without defendant's knowledge or consent, and for good and sufficient consideration in that behalf, agreed with W. to give, and did give him time for payment of the principal and interest secured by said mortgage beyond the time when it fell due. *Held*, on demurrer a good plea; that the declaration clearly shewed defendant to be only surety; that the consideration was sufficiently stated; that the agreement might be by parol; and that it was not necessary to shew that the defendant was prejudiced by the giving time. At the trial it appeared that the assignment containing the covenant sued on had been executed by one C., as attorney for defendant, during his absence from the country, under a power which authorised him only to collect debts and to execute all such deeds and perform all such acts as might be considered necessary and proper concerning the business of defendant; but it was proved that defendant, before leaving, agreed to give this covenant, and told the attorney of it, in consequence of which the latter executed the deed, and received the money. *Held*, that under these circumstances the authority was sufficient, and defendant could not refuse to be bound by the covenant.

As to the giving time, it was shewn that when the mortgage fell due the plaintiff told W., the mortgagor, that he would wait on his paying 12 per cent. No time was settled, but W. signed two notes for £24 each, for one year's interest, which he paid, and afterwards two others, on which the plaintiff had sued and obtained judgment. Nothing was said about defendant's liability when this arrangement was made, and defendant was not aware of it until long after. The court

being left to draw the same inferences as a jury: *Held*, that the equitable plea was proved, and defendant discharged. *Darling, Executor v. McLean*, 372.

2. *Action against principal and surety—Competency of principal as witness.*—In an action on a bond against principal and sureties for the due performance by the principal of his duties as agent to the plaintiffs, alleging the non-payment of moneys received: *Held*, that the principal was clearly a competent witness for the plaintiffs to prove the amount of his defalcation; and that on the authority of *Lamb v. Teeter*, 18 U. C. R. 304, his evidence for defendants on other points was rightly rejected. *The Mutual Fire Insurance Company of Prescott v. Palmer et al.*, 441.

3. *Bond by sureties—Construction—Liability for past defaults.*—Upon a bond conditioned that one J. should pay to the plaintiffs monthly and every month during the time for which he should act as their agent, all moneys which he then had received, or which he should receive for premiums, &c., and should repay to the applicants all moneys which he had then received or should receive for insurances not accepted by the plaintiffs, and should in all things well and faithfully conduct himself as their agent, *Held*, that the sureties were liable only for moneys received after the execution of the bond. *The Canada West Farmers' Mutual and Stock Insurance Company v. Merritt et al.*, 444.

4. *Collector's bond—Action against sureties—Form of bond—Delay in delivery of roll—Extension of time for collection—Power of arbitrator under reference at nisi prius.*—In an action on a bond given to T., the plaintiff,

describing him as treasurer of the municipality of Fergus, for the performance by defendant P. of his duties as collector. *Held*, 1. That the neglect of the clerk to deliver to P. the roll before the 1st of October, as directed by 16 Vic., ch. 182, sec. 39, formed no defence for the sureties. 2. That they were not relieved by the extension of time for collection of the rates allowed by the council to P. 3. Affirming *Judd v. Read*, 6 C. P. 372, that the action might be maintained by the plaintiff as treasurer, though the statute directs that the bond shall be taken to the municipality.

The case was referred at *nisi prius*, with the same power to the arbitrator as the judge had to amend the pleadings, and under this he allowed pleas to be added raising the first and second questions above mentioned, which he referred to the court, with the last. *Per McLean J.*, the last objection should not have been allowed by the arbitrator. *Todd v. Perry et al.*, 649.

See COVENANT 2.—CUSTOMS 1.—  
SET OFF.

## PROHIBITION.

See DIVISION COURT, 2.

## PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

## QUARTER SESSIONS.

*New trial—C. S. U. C. ch. 113.*—Defendant was convicted of an assault at the quarter sessions and fined, but during the same sessions he obtained a new trial on his own affidavit, and was acquitted at the following sessions. *Held*, that the quarter sessions had authority to grant such new new trial and that

this court could not interfere.—*Regina v. Fitzgerald*, 546.

See CRIMINAL LAW, 4.

## RAILWAYS AND RAILWAY COMPANIES.

1. *Expulsion from train—Evidence of contract to carry—Production of ticket, how far conclusive—Suspicious circumstances.*—In an action against a railway company for putting the plaintiff off a train, defendants pleaded that they had not received the plaintiff to be carried for reward, as alleged. It appeared that the ticket offered by the plaintiff to the conductor must have been sold about sixteen months before, and that the conductor refused to take it on that account. It was proved also, that on a previous occasion the same plaintiff had presented an old ticket, and on its being rejected had paid his fare. *Held*, reversing the judgment of the county court, that the circumstances being calculated to excite suspicion, the mere production of the ticket was not sufficient to entitle the plaintiff to succeed, but that it should have been left to the jury to say whether the plaintiff had procured it fairly, or was attempting an imposition. *Davis v. The Great Western Railway Company*, 27.

2. *Collision at crossing—Neglect to give signal, and to construct crossing on a proper level—Limitation of action therefor—Consol. Stat. C. ch. 66, sec. 83—Train under control of contractor, not of defendants*—The plaintiff sued defendants for injury caused to himself and his waggon by collision with their train at a railway crossing, owing to a neglect to sound the whistle or ring a bell on their approach, as required by the statute, and to improper construction of the railroad, being more above the level of the highway than the act allowed.

The jury having found for the plaintiff: *Held*, that the injury, if arising from either cause alleged, was sustained "by reason of the railway:" that it was not a case within the exception as to "continuation of damage;" and that the action having been brought more than six months from the accident, was therefore too late.

The defendants had contracted with one P. to ballast their road, and the train in question was laden with ballast, under the charge of men employed and paid by him, the defendants having no control, except that by his contract he was bound to keep these trains from interfering with the passage of other trains along the road. *Quære*, whether this would have relieved the defendants from liability. *Browne v. The Brockville and Ottawa Railway Co.*, 202.

3. *Neglect to give signals—Collision—Mismanagement of plaintiff—Liability.*]—Where a railway train in approaching a crossing neglects to give the proper signals, the company will not be relieved from liability because the person whose cattle were run over did not take the best means to avoid the accident, or because his horses were unmanageable. *Tyson v. The Grand Trunk Railway Company of Canada*, 256.

4. *Action against municipality as shareholders in R. W. Co.—Stock payable by debentures—14 & 15 Vic., ch. 51, secs. 18, 19—Pleading.*]—To a declaration under 14 & 15 Vic., ch. 51, sec. 19, by judgment creditors of a railway company against a municipality as shareholders, defendants pleaded, in substance, that they subscribed for the stock under a by-law, which provided that their debentures, payable in 1877, should be issued for the sum subscribed

as the same should become payable, and that the company should take such debentures at par; and that the plaintiff knew this before he became a creditor. *Held*, on demurrer, a good defence.

The 19th clause of the statute does not apply in the case of a subscription under the 18th, unless such subscription is made in the ordinary manner.—*Higgins et al. v. The Corporation of the town of Whitby*, 296.

5. *Collision—Action by servant of contractor—Liability.*]—Declaration, that the plaintiff was a servant in the employment of one K, a contractor with defendants for keeping their road in repair: that in performing said repairs certain carriages and engines, under the management of defendants' servants, were used to transport materials and convey workmen employed by K.: that the plaintiff being one of such workmen, became a passenger in one of these carriages to be carried from his place of work to his residence; and that it was defendants' duty to use proper care in the management of said train, but by their negligence it came into collision with another train, whereby the plaintiff was injured. *Held*, sufficient to shew defendants liable. *Torpy v. The Grand Trunk Railway Company of Canada*, 446.

6. *Railway—Detention of plaintiff by conductor, under 18 Vic., ch. 176, sec. 10—Limitation of action.*]—In an action for assault and false imprisonment, it appeared that defendant, being a conductor of a railway train, had detained the plaintiff under 18 Vic., ch. 176, sec. 10, to take him before a magistrate upon the charge of having obstructed defendant in the execution of his duty. *Held*, that he was entitled to the protection of the 26th clause, and that the action having been brought more



than six months after the act complained of was too late. *Lauzeau v. Leonard*, 481.

7. *Horses escaping on railway—Plaintiff's possession of close.*—The plaintiff owning land adjacent to the railway, permitted one D., a servant of the company living within their fences, to cultivate a small piece free of rent. D. made a gate in the railway fence to give him access to this land, and the plaintiff's horses passed through it to the railway track and were killed. *Held*, affirming the judgment of the county court, that the plaintiff was sufficiently in possession of the close from which the horses escaped to entitle them to recover. *Henderson v. The Grand Trunk Railway Co. of Canada*, 602.

8. *Consol. Stats. C. ch. 66, sec. 5.—Construction of—Lands injuriously affected—Right to compensation.*—One W. owned land upon the navigable river Maitland extending to high water mark. The Buffalo and Lake Huron Railway Company constructed their road upon the river, not touching his land, but connected with the bank above and below it, thus shutting him out from the river except across the railway. *Semble*, that his land was not "injuriously affected," so as to entitle him to compensation under the Railway Act, sec. 5. *Quære*, whether the statute applies in any case where the land itself is not injured bodily, though the owner may sustain damage by its depreciation in value or otherwise. *Quære*, also, whether the power given to this company by their special act, 19 Vic., ch. 21, sec. 36, is controlled by secs. 136, and 138 of the Railway Act, notwithstanding the provisions in sec. 139. *In the matter of Charles Widdar and the Buffalo and Lake Huron Railway Co.*, 638.

## RECEIPT.

*For purchase money in deed.*—See EQUITABLE PLEADINGS, 2.—ESTOPPEL, 2.

## REGISTRAR.

*Omission of mortgage in certificate—Action therefor—Notice of action and limitation—Consolidated Stats. U. C. chs. 126, 89—Damages—Costs of suit by first mortgagee.*—A registrar being applied to by the plaintiff for a certificate of the registries on a lot, gave one in which he omitted to mention a mortgage for \$600, prior to that which the plaintiff purchased, supposing it, from the certificate, to be a first incumbrance. The first mortgagee obtained a decree for sale, and the plaintiff purchased the land at less than what would satisfy the two mortgages, but he soon afterwards sold at a considerable advance, so that in the end he would receive all that he had paid for his mortgage. In an action against the registrar for this omission in his certificate, the jury gave \$500 damages. *Held*, that the registrar was not entitled to notice of action, and that the six months limitation clause did not apply, for though an officer within the meaning of the act, *Consol. Stats. U. C.*, ch. 126, this was not an act committed, but a negligent omission. *Held*, also, that the damages were moderate, the plaintiff having in fact sustained loss to the full amount of the first mortgage.

The plaintiff having been made a party to a suit in Chancery on the first mortgage endeavoured to obtain priority, but failed in his defence, and was compelled to pay costs. Whether these costs could be recovered from the registrar was a point raised, but not decided, as it was uncertain whether they were

included in the verdict. *Harrison v. Brega*, 324.

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### RELIGION.

*Effect of becoming a nun*]—See DEED.

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### RENT.

*Sale of goods under fi. fa., without paying rent—Action therefor.*]—See SHERIFF.

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### REPLEVIN.

See APPEAL 4.—SHIPPING.

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### RULES OF COURT.

*As to costs, and Crown office.*]—See PAGE 123.

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### SALE OF GOODS.

1. *Verbal sale—Interpleader—Change of possession—Description of goods*—20 *Vic., ch. 3.*]—On an interpleader issue to try the title to two locomotives, it appeared from the finding of the jury, that in September, 1858, when they were half finished, the plaintiffs verbally agreed with G., the manufacturer, to buy them from him for \$16,000, payable as he might require it, for which they were to be finished by him; and on the 3rd of January, 1859, by deed reciting this arrangement, G. conveyed them to the plaintiffs. The defendant claimed under an execution issued after the agreement, and when that was made there was an execution in the sheriff's hands, at the suit of a third party, which was subsequently paid. *Held*, 1, that by the verbal agreement the property passed, and that the chattel mortgage act did not apply, a change of possession being impossible under the circumstances. 2. That the execution in the sheriff's hands clearly could not affect the plaintiff's claim as against

the defendant. 3. That if it were necessary to determine that point, the locomotives were sufficiently described in the deed of the 3rd of January, set out in the case.—*Burton et al. v. Bellhouse*, 60.

2. *Sale of goods—Quantity not ascertained—Property held not to pass.*]—B. transferred to one S. 100 tons of coal, as security for an endorsement. He had then a certain lot of coal lying on a wharf, supposed to contain that quantity, though in reality only 78 tons, and subject to a claim for wharfage equal to the value of ten tons, but the jury found that the transfer was not confined to this lot, but was of 100 tons, B. having more in his yard. No other coal, however, was set apart, and it had not been ascertained how much would be required to make up the difference, when B. assigned all his effects, including the coal in the yard, to the plaintiff for the benefit of creditors. Defendant afterwards removed from the yard 42 tons, being 22 to make up the deficiency in quantity, 10 for wharfage, and 10 because the quality of that in the yard was inferior to that on the wharf, but he afterwards abandoned his claim to the last 10 tons. *Held*, that the plaintiff was entitled to recover, for the sale to S. did not pass the property in any of the coals in the yard. *McDougall v. Elliott*, 299.

*Deceit as to title—Unsuccessful action by purchaser—Right to recover costs of*]—See COSTS.

*Attempt to defraud customs—Complicity of defendants—Set-off.*]—See CUSTOMS, 2.

See MUNICIPAL CORPORATIONS, 3.

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### SALE OF LAND.

See EQUITABLE PLEADINGS.—LIBEL AND SLANDER.—MORTGAGE, 2, 3.

## SATISFACTION.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES, 3, 5.**—**MORTGAGE, 1.**

## SCHOOLS.

See **COMMON SCHOOLS.**

## SCIRE FACIAS.

See **OFFICES (SALE OF).**

## SEDUCTION.

*Action by the mother—Abatement by death—Consol. Stats. U. C., ch. 77, sec. 3.*—Where the mother of the person seduced brought an action within six months from the birth of the child. *Held*, that by the statute the master's right of action was taken away, notwithstanding that the suit brought by the mother had abated owing to her death, after verdict in her favour had been set aside, and before a new trial granted had taken place. *Cross v. Goodman*, 242.

## SEISIN.

See **DOWER.**

## SESSIONS.

See **QUARTER SESSIONS.**

## SET-OFF.

*Action against sureties of division court clerk—Set-off.*—An action against the sureties of a division court clerk for moneys received by him for the plaintiff, having been referred to arbitration, the arbitrator submitted a special case, stating that in 1858 the plaintiff sued the clerk for goods sold to him; that the clerk then produced a memorandum of settlement between them, signed by the plaintiff, relating to suits in the division court, which shewed a sum of £30 0s. 8d. due to the clerk; that the judge thereupon, against

the clerk's wish, and without any particulars of set-off having been given, treated this as a set-off and deducted it from the plaintiff's claim. The sureties, defendants in this suit referred, contended that the plaintiff's demand then sued for being a private account against the clerk, that sum was improperly set off, and they claimed to have it credited to them in this action against moneys since received for the plaintiff. *Held*, that what had been done in the former suit could not be thus reviewed, and that as the clerk could not take credit a second time for this sum as against the plaintiff, neither could his sureties. *Franklin v. Gream et al.*, 84.

See **COVENANT, 1.**—**CUSTOMS, 2.**

## SHERIFF.

*Sale of goods under fi. fa. without paying rent—Action therefor—Averment of notice.*—In a declaration against a sheriff or coroner for removing and selling goods under a writ without satisfying rent in arrear, it is sufficient to allege that defendant had notice of the plaintiff's claim before sale, though after the removal. It is a bad plea therefore to such a declaration, that defendant had no notice before the removal.

A plea that after the removal of the goods by defendant there remained sufficient to satisfy the rent in arrear, *held*, clearly bad. *The Corporation of the City of Kingston v. Shaw*, 223.

See **BOND TO THE LIMITS—ESCAPE—OFFICES (SALE OF).**

## SLANDER.

See **LIBEL AND SLANDER.**

## SHIPPING.

*Registration—Effect of Imperial Act, 17 and 18 Vic., ch. 104—Sale*



*of equity of redemption.*—The Imperial Act, 17 and 18 Vic., ch. 104, does not repeal altogether the provincial statute 8 Vic., ch. 5, but applies only to vessels proceeding to sea, and our statute remains in force as to all vessels navigating exclusively the inland waters of the province.

Where a mortgaged vessel had been sold under a *fi. fa.*, and the purchaser brought replevin: *Held*, that he acquired no right, the equity of redemption not being saleable, and that the defendant must succeed on a plea denying the plaintiff's property, though he shewed no connexion with the mortgage. *Scott v. Carveth et al.*, 430.

See AGREEMENT 3.

## SLAVERY.

See EXTRADITION.

## STATUTES (CONSTRUCTION OF.)

5 & 6 Ed. IV., ch. 16.—See Offices, (Sale of.)

8 Anne, ch. 14.—See Sheriff.

49 Geo. III., ch. 126.—See Offices, (Sale of)

54 Geo. III., ch. 9.—See Forfeited Estates.

59 Geo. III., ch. 12.—See Forfeited Estates.

8 Vic., ch. 5.—See Shipping.

12 Vic., ch. 22.—See Bills of Exchange and Promissory Notes, 7.

12 Vic., ch. 73.—See Mortgage, 1.

14 & 15 Vic., ch. 51, secs. 18, 19.—See Railways and R. W. Cos., 4.

17 & 18 Vic., ch. 104, (Imperial Act.)—See Shipping.

18 Vic., ch. 176, secs. 10, 26.—See Railways and R. W. Cos., 6.

19 Vic., ch. 21, sec. 36.—See Railways and R. W. Cos., 8.

20 Vic., ch. 3.—See Sale of Goods, 1.

Consol. Stats. U. C., ch. 15, sec. 67.—See Appeal, 3.

Consol. Stats. U. C., ch. 19.—See Division Courts, 1.

Consol. Stats. U. C., ch. 22, (Common

Law Procedure Act.)—See Arbitration, 4.—Bond to the Limits.—Mortgage, 2, 3.

Consol. Stats. U. C., ch. 27, sec. 17.—See Ejectment, 2.

Consol. Stats. U. C., ch. 30.—See Interpleader.

Consol. Stats. U. C., ch. 35.—See Articled Clerk.

Consol. Stats. U. C., ch. 45.—See Description of Goods.

Consol. Stats. U. C., ch. 54.—See Municipal Corporations, 2, 4.

Consol. Stats. U. C., ch. 55.—See Municipal Corporations, 1.

Consol. Stats. U. C., ch. 64.—See Common Schools, 1, 2.

Consol. Stats. U. C., ch. 77, sec. 3.—See Seduction.

Consol. Stats. U. C., ch. 89.—See Registrar.

Consol. Stats. U. C., ch. 113.—See Quarter Sessions.

Consol. Stats. U. C., ch. 126.—See Registrar.

Consol. Stats. C., ch. 65.—See Gas Companies.

Consol. Stats. C., ch. 66.—See Railways and R. W. Cos., 2, 8.

Consol. Stats. C., ch. 89.—See Extradition.

Consol. Stats. C., ch. 91, sec. 5.—See Criminal Law, 4.

Consol. Stats. C., ch. 92, sec. 44.—See Criminal Law, 1.

## STATUTE OF FRAUDS.

See FRAUDS (STATUTE OF.)

## STATUTE OF LIMITATIONS.

See LIMITATIONS (STATUTE OF.)

## STAYING PROCEEDINGS.

See APPEAL, 4.

## STOCK.

*Action against Municipality as shareholder in R. W. Co.*—See RAILWAYS AND R. W. COS., 4.

## SURETY.

See PRINCIPAL AND SURETY.

## TAXES.

See PRINCIPAL AND SURETY, 4.

## TELEGRAPH.

*Acceptance of lease by.*—See LANDLORD AND TENANT 3.

## TERM OF YEARS.

*In land—Not saleable under division court execution.*—See DIVISION COURT, 1.

## TITLE.

*Admission of.*—See AGREEMENT, 1. See COSTS —COVENANTS FOR TITLE. —EJECTMENT.—EQUITABLE PLEADINGS, 1.—ESTOPPEL, 1.—FORFEITED ESTATES.—LANDLORD AND TENANT, 1.—MORTGAGE, 2, 3.

## TRESPASS.

1. *Declaration—Whether trespass to land or goods charged.*—*Declaration*, that the plaintiff being the mortgagee and owner, and one F. being the occupant by plaintiff's permission, under an overdue mortgage between them, of a certain saw factory worked by a certain other steam engine thereon, all situate upon and forming part of a certain close, buildings, erections, and appurtenances, known as, &c., (describing the land,) the defendant, under a false claim of purchase of such steam engine, wrongfully broke, and caused to be broken, such saw-factory for the purpose of taking, and did thereupon wrongfully take, and cause to be taken therefrom such steam engine, and also thereupon wrongfully took such steam engine, and caused the same to be wrongfully taken away and converted to his own use. Defendant pleaded, 1. That the goods and chattels mentioned were not the plaintiff's. 2. That

the close was not his. *Held*, on demurrer, that the declaration charged a substantive trespass both to the land and goods, and that the pleas therefore were bad, as professing each to answer the whole cause of action, and being a defence only to part. *Lambe v. Teeter*, 82.

2. *Trespass to land—Evidence of possession by plaintiff.*—The plaintiff's husband living close to the lot of land in question, had for many years cut fire-wood and made sugar on it, and it had been assessed to him since 1843, but others had made similar use of it, though not to the same extent; it had never been enclosed, and the neighbours' cattle as well as his were accustomed to run over it. The plaintiff, a few days before this action, put up a fence on it, and some of the defendants thereupon put up another inside of it, and afterwards they all put up a fence along the limit between this and the next lot, thus shutting out the plaintiff, and fencing in the part which she had enclosed. *Held*, that the plaintiff (shewing no other title) had not such exclusive possession as would entitle her to maintain trespass. *Bailey v. McNeily et al.* (nine defendants,) 451.

3. *Trespass to land—Possession—Prior ejectment—Estoppel.*—In an action for trespass to land the plaintiff proved a good paper title derived through a sale for taxes, but he had never been in actual possession, and it was shewn that after the plaintiff obtained his deed the defendant had cut timber on the land and built a shanty for the lumbermen, although the plaintiff went there and forbade him; and it appeared that the plaintiff had brought ejectment against him, but had not proceeded with it after defendant appeared. The defendant

claimed under a deed from the heirs of the patentee, and it was sworn that before defendant purchased the plaintiff also wished to buy from them, saying that he thought his own title not good. *Held*, that the plaintiff was sufficiently in possession to maintain trespass, and that he was not estopped by having brought ejectment, as being an admission of defendant's possession. *Heck v. Knapp*, 360.

*See* AMENDMENT.

### VARIANCE.

*See* GUARANTEE.

### VENDOR AND VENDEE.

*See* SALE OF GOODS.—SALE OF LAND.

### WHARVES.

*See* MUNICIPAL CORPORATIONS, 4.

### WILL.

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.—FORFEITED ESTATES.

### WITNESS.

*Action against Principal and Surety—Competency of principal as witness.*—*See* PRINCIPAL AND SURETY, 2.

*See* COMMISSION TO EXAMINE WITNESSES.—EVIDENCE.

### WORDS (CONSTRUCTION OF.)

*Agents.*—*See* CRIMINAL LAW, 1.  
*"Land injuriously affected."*—*See* RAILWAYS AND R. W. COS. 8.



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